

Historic, Archive Document

Do not assume content reflects current
scientific knowledge, policies, or practices.

Reserve set
LIBRARY

OF THE

UNITED STATES
DEPARTMENT OF AGRICULTURE

Class 1

Book S045C

8-1577

385735



385735

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 1.

GEO. P. McCABE, Solicitor.

NEGLIGENCE OF EMPLOYEE IMPUTABLE TO CARRIER.

Decision of the United States District Court for the District of Montana in Cases Involving Violations of the Act of Congress of June 29, 1906 (34 Stat., 607), Commonly Known as "The Twenty-eight Hour Law."

The failure of one employee of a common carrier to notify another employee that live stock were in cars does not relieve the carrier from liability for willfully and knowingly failing to comply with the act.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, A CORPORATION,

Defendant.

MEMORANDUM ORDER.

The pleadings and the statute under which plaintiff seeks damages bring the case made within the rule of decision in *Newport News Co. vs. U. S.*, 61 Fed., 488. While there are a few changes between the language of the statute of 1906 (34 Stat. L., 607) and the earlier statutes of 4386-4388 R. S. U. S., under which the decision cited was rendered, still the doctrine there announced by the Court of Appeals ordinarily covers cases where failure to unload is due to omission to comply with the rules of the company by its employees. The reasoning of the court in the opinion appears to me to be clear and accurate.

That the violation of the rules was of a particular kind, namely, oversight and failure by one employee to advise properly and promptly other employees that live stock were in the cars, does not relieve the company from liability for having willfully and knowingly failed to comply with the provisions of the law. The facts pleaded in the answer of defendant company of themselves, therefore, negative the allegation that the failure to rest the horses was not done willfully and knowingly.

The confinement not having been due to storm or other accidental or unavoidable cause, which could not have been anticipated or avoided by the exercise of due diligence and foresight, defendant is liable for the penalty prescribed.

Plaintiff's motion for judgment on the pleadings is granted. Defendant's counter motion is denied.

WM. H. HUNT,

Judge.

NOVEMBER 8, 1907.

**Brief for the Government on Liability of Common Carrier for Violation of the
Twenty-eight Hour Law, Caused by Failure of Carrier's Employees to Obey its
Instructions. Authorities Cited.**

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA.

THE UNITED STATES OF AMERICA, *Plaintiff*,
vs.
 GREAT NORTHERN RAILWAY COMPANY, A
 CORPORATION, *Defendant*.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON
THE PLEADINGS.

This action was brought against the defendant under the act of Congress of June 29, 1906 (34 Stat. L., p. 607), entitled "An act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia," etc., being commonly known as the twenty-eight hour law.

In substance the act in question provides that no railroad or other common carrier, whose road forms any part of a line of road over which cattle, sheep, swine or other animals shall be conveyed from one State into or through another, shall confine such animals in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours,

unless prevented by *storm or by other accidental or unavoidable causes* which can not be anticipated or avoided by the exercise of due diligence and foresight.

By section 3 of the act it is provided that any railroad, express company, or other common carrier,

who knowingly and willfully fails to comply with the provisions of the two preceding sections, shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars,

to be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business.

The complaint alleges that the defendant company is a corporation organized and existing under the laws of the State of Minnesota and is operating a railroad and carrying on its business as a common carrier in the State and District of Montana; that its railroad within the State of Montana forms a part of a line of road operated by said defendant

over which cattle, sheep, swine, and other animals are conveyed from one State of the United States into and through another, to wit, from the State of Washington into and through the State of Montana, and more particularly from Hillyard, Wash., through the State of Idaho and through the State of Montana to the city of Kalispell, in said State of Montana.

That on August 24, 1906, at 5.30 o'clock p. m. of said day, at Hillyard, Wash., 122 horses were loaded on five certain railroad cars, then and there used and operated by said defendant company, for the purpose of conveying and transporting said horses, in said cars, from Hillyard, Wash., through said States of Idaho and Montana by way of Kalispell, Mont., to Alberta, in the Northwest Territory, Dominion of Canada.

That the said cars of horses left Hillyard, at or about the hour of 5.30 p. m., August 24, 1906, and arrived at Kalispell at the hour of 5.30 p. m., on August 26, 1906; that while the said defendant was so engaged in carrying said horses from Hillyard, Wash., to Kalispell, Mont., it knowingly and willfully confined the same in said railroad cars upon said road for more than twenty-eight consecutive hours, to wit, for a period of forty-eight consecutive hours without at any time during said period of forty-eight consecutive hours unloading the same for rest, water, and feeding, and that such unloading for the purpose of rest, water, and feeding was not prevented by storm or by other accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, and that the said horses were not carried by said defendant in cars or conveyances in which they could and did have proper food, water, space, and opportunity to rest.

In the answer filed by the defendant, all of the material allegations are confessed and admitted, and it is conceded that the horses in question were confined in the cars of the defendant for a period of more than twenty-eight hours without being unloaded for food, rest, or water, but that they were so confined "by defendant's employees."

It is denied that defendant

did knowingly or willfully confine said horses in said railroad cars for the period aforesaid or for any other period,

and with reference to this matter the defendant says—

that the confining of said horses in said cars for the period aforesaid was in violation of its rules and in disobedience, by its employees, to its instructions to all of its agents and servants, but the said violation of said instructions and rules by defendant's employees, as aforesaid, was not willful, but was due only to the oversight and failure on the part of one of defendant's dispatchers to properly and promptly advise other dispatchers as to the fact that carloads of horses constituted part of the train in which the cars containing said live stock were included.

This is the situation of the case as disclosed by the pleadings, and it is clear that no defense is presented and no showing is made by the

answer preventing the granting of judgment upon the pleadings as demanded in the plaintiff's complaint. According to the affirmative matter alleged upon which the defendant's denial of having "knowingly and willfully" failed to comply with the provisions of the law, such failure was due to the palpable and culpable negligence of its agents and employees. The failure to unload was, therefore, not due to storm or other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight,

which are the only causes which could be urged in justification for a failure to comply with the law. Such failure to unload, in the absence of the exculpatory causes mentioned in the statute, is of itself negligence *per se*.

Moore on Carriers, page 508, sec. 9.

6 Cyc., page 439.

Reynold *vs.* Ry. Co., 40 Wash., 163; 82 Pac., 161.

In fact, the excuse of storm, or other accidental cause, does not cover accident to a railroad train through negligence.

Newport News Co. *vs.* U. S., 61 Fed., 488.

The last-cited case, decided by the Circuit Court of Appeals for the Sixth Circuit, is decisive of the case at bar. That case was brought under sections 4386-4388 of the Revised Statutes, which were substantially the same as, but have been repealed by, the present act, and which prohibited the confining of live stock in cars for a longer period than twenty-eight consecutive hours,

unless prevented from so unloading by storm or *other accidental causes*.

In that case the failure to unload as required by the statute was caused by an accident due to the negligence of the train crew. It was contended that as the excuse for over confinement by "*storm*" was of a class within what the law regards as an "act of God," that Congress having added another of a different character, described as "other accidental causes," indicated a purpose

to except detentions due to causes not the act of God and described by the term "accidental,"

and that this construction found support in section 4388, because the penalty was imposed upon such carriers only as should knowingly and willingly fail to comply with the requirements.

But the court, after stating that the mere fact of encountering a storm would furnish no excuse, if its consequences could have been avoided or mitigated by the exercise of diligence, and that the carrier could not escape the penalty imposed for failure to comply, unless,

with all reasonable exertion, a carrier is unable, by reason of the storm, to comply with the law,

and had thereby been unavoidably "prevented" from obeying the law, the court proceeds as follows:

We can reach but one conclusion as to the meaning of Congress by the expression, "other accidental causes."

If the storm is no excuse, unless its unavoidable effect was to prevent compliance, then it follows that no other accidental causes would be an excuse, unless that cause and its effect are likewise unavoidable. The meaning of the general words "other accidental causes" must be ascertained by referring to the preceding special words. The rule "*noscitur a sociis*" is clearly applicable. A storm is unavoidable, in the sense that it cannot be prevented. "Other accidental causes" must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention but an effect of that negligence.

Then, after defining the term "inevitable or unavoidable accident," the court says:

These definitions apply to an unavoidable accident, which is, in the sense of the law, an inevitable occurrence, as defined in that case and those cited therein. If the accident was one which might have been avoided by due care, then the carrier must be taken to have contemplated the reasonable consequences of his own negligence. In this sense, he may be said to have "knowingly and willingly" failed to comply with the requirements of the law. If he was not prevented by lawful excuse, he has knowingly and willingly failed to unload for rest, food, and water, as required by law. The several sections of the act must be construed together. We must give effect to the first section, as well as to the third. To put the constructions upon the words "knowingly and willingly" contended for by appellant would be to eliminate the positive terms of the affirmative section of the act. Congress has specified the excuse which will take a case without the act. If the statutory contingencies are not shown to have prevented compliance, the carrier has willingly failed to unload as required.

To the same effect:

Chesapeake & O. R. Co. *vs.* Am. Ex. Bank, 92 Va., 495; 44 L.

R. A., 449, p. 458.

Nashville, C. & St. L. R. Co. *vs.* Heggie, 86 Ga., 210.

Hale *vs.* Mo. Pac. R. Co., 36 Neb., 266.

And as to the term "willfully fail," see:

Louisville Ferry Co. *vs.* Com., 104 Ky., 726.

Tracy *vs.* Com. (Ky.), 76 S. W., 184.

8 Words and Phrases, pp. 7477, 7479.

Penal Code of Montana, sec. 7, subd. 1.

From the foregoing it is clear that the motion for judgment on the pleadings is well taken and should be granted.

Respectfully submitted.

CARL RASCH,
United States Attorney.

120

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 2.

GEO. P. McCABE, Solicitor.

UNIT OF VIOLATION UNDER "THE TWENTY- EIGHT HOUR LAW."

Opinion of the Circuit Court of Appeals for the Sixth Circuit in Cases Involving Violations of the Act of Congress of June 29, 1906, Commonly Known as "The Twenty-eight Hour Law."

Nos. 1770 and 1771.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

v.

THE BALTIMORE & OHIO SOUTH-
WESTERN RAILROAD COMPANY,
Defendant in Error.

Error to the District Court of the
United States for the Southern
District of Ohio.

Submitted January 7, 1908. Decided February 4, 1908.

Before SEVERENS and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

SEVERENS, Circuit Judge, delivered the opinion of the court.

The two causes above entitled were heard together in this court, being alike in all essential particulars. They were two of twelve similar causes in which suits were brought by the United States to recover penalties for several violations by the defendant railroad company of an act of Congress entitled "An act to prevent cruelty to animals while in transit by railroad or other means of transportation" from one State to another, etc., passed June 29, 1906. The suits were all brought in the District Court of the United States for the Southern District of Ohio, and each related to distinct shipments of cattle and swine made by different parties from stations of the railroad company in other States to various consignees at Cincinnati, Ohio. The petition in each case alleged a shipment over the defendant's road, from a station in another State than Ohio, by a party named, of the live stock therein described, to a certain consignee at Cincinnati; and then alleged that the time occupied in the transportation was more than forty hours, in the first of the cases above entitled, forty-three hours and forty-five

minutes, and in the second, forty-five hours and twenty-five minutes, and further alleged that this transportation was made without unloading the said live stock for rest, water, and feeding, or either; "and that said defendant knowingly and willfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours; and further, that the said live stock, above described, were carried in a car in which they could not and did not have proper food, water, space, and opportunity to rest."

The defendant by its answer admitted all the material allegations of the petition, but averred that the shipment mentioned in the petition "was forwarded to Cincinnati on a certain train of the defendant, known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock to-wit," describing eleven other such shipments by various other consignors to consignees at Cincinnati, Ohio, from stations in other States; and that in respect of each of those cases the railroad company had been in like default; and that eleven other suits brought by the United States, each for a penalty based on the same default were then pending in that court. Upon these facts the defendant claimed that but one offence had been committed and but one penalty incurred. On filing this answer the defendant moved that the several causes be consolidated, "in order that there may be a recovery of but one penalty for all the shipments." The court being of opinion that the statute dealt with the operation of trains by railroad companies, and not with the different shipments which the trains may carry, the motion was allowed. The District Attorney moved for a judgment for a penalty, separately, in each case "for the reason that each of said causes should be treated as a different cause of action, and a separate penalty assessed in each." This motion was overruled; and the plaintiff excepted to this ruling. The court thereupon entered the following judgment:

The court, being fully advised in the premises, finds that the defendant herein admits its liability in this cause, and therefore doth hereby order and adjudge that said defendant pay to the plaintiff herein the sum of one hundred dollars and its costs herein expended, and in default of payment execution shall issue, and the court does order, adjudge and decree that the within foregoing order in cause number 1866, shall apply to, operate upon, and be conclusive of the right of the plaintiff to recover of the defendant in each of the following causes, to-wit: 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884.

The causes were properly consolidated. Section 921 of the Revised Statutes provides that "when causes of a like nature or relative to the same question are pending before a court of the United States," this may be done. Whether one judgment may be given for all or a separate judgment in each case will depend upon the special circumstances. If it is necessary to the due administration of the law and the protec-

tion of the rights of the parties that the integrity of the several causes shall be so far preserved as to secure the proper result in each case, to the end that the party aggrieved may not be embarrassed thereby in seeking relief against the judgment or for any other sufficient reason, the court will direct the proceedings accordingly. The statute is one for convenience in saving expense to the parties and the time of the court.

The validity of the Act of June 29, 1906, is not disputed; nor is the commission of the offence, or offences, charged in the several petitions. The question presented on these writs of error relates to the penalty, and that depends upon the construction of the first section of the act, which reads as follows:

Be it enacted, etc., That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: *Provided,* That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided,* That it shall not be required that sheep be unloaded in the night time, but where the time expires in the night time in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

The contention for the plaintiff is that this statute deals with separate shipments or consignments of live stock, and that it does not matter that more than one shipment is taken by a train; and therefore that several offences may be committed in the transportation of a single train load. The defendant insists that the train load of live stock is the integer which the statute contemplates as the objective thing to which the forbidden act relates and that therefore the offence is single, though there may be several shipments of stock in a train which may be affected by the same neglect.

It may be admitted that the statute is not so clear upon this subject as would be desirable. The language is quite general and there is but one salient expression upon which we can lay hold with confidence. This is contained in the provision that the twenty-eight hour limitation may be extended to thirty-six hours "upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading," etc. It seems to us that this gives the key by which the meaning of the act in this respect may be interpreted. It is the owner of the shipment or his representative having the custody of the shipment who is to be referred to as authority for prolonging the transportation without unloading; and it is manifestly implied that there is a bill of lading or other contract which governs the transportation of that shipment. No other person than the one concerned with that shipment is given the power to prolong the transportation without unloading. And one shipper could not exercise his right if he was one of several; or if he could, it would disable other shippers from exercising the right to have their stock unloaded for rest and feeding and then go on. It is urged that it would be very inconvenient for the railroad company to dismember its trains by dropping out one or more cars at different stations and leaving them to be picked up by other trains which may or may not find it convenient to take them in. But the duty imposed by the statute, however construed, is highly inconvenient, and it is a difference in degree merely. Besides we have little doubt that the company, having in mind the duty it would be under to comply with this requirement, would be able to so adjust its train service as to meet such contingencies without serious derangement. The argument based upon the supposed inconvenience to the railroad company does not impress us as being very persuasive, although if the matter were very doubtful it would deserve to have some weight.

The construction which we propose leads to the harmonious operation of the several provisions of the statute more effectively than any other which has been suggested. And if, as no one doubts, the law is not void for uncertainty and should be given effect, our only duty is to ascertain what it means and execute it accordingly. The maxims and rules adopted for the purpose of interpreting the meaning of a statute require that we attend to all its provisions and, if possible, attribute to the language in which each is expressed a meaning which will permit other provisions to have their due effect. This doctrine is so well settled that the rules by which it is formulated have become axiomatic. Two of them, *Ex antecedentibus et consequentibus fit optima interpretatio* and *Noscitur a sociis*, are expounded in Broom's Legal Maxims at pages 555 and following. A good statement of the doctrine as applied to the case before us is contained in 26 A. & E. Encyl. of L., 616, 2d ed.,

where it is said: "In construing a section of an act, regard must first be had to the language of the clause itself and second to other clauses in the same act, and that construction should be adopted which makes the whole act stand consistently together or reduces the inconsistency to the smallest possible limits." We add some of the cases in the Supreme Court in illustration.

Pennington v. Coxe, 2 Cr. 33, 52.

Alexander v. Alexandria, 5 Cr. 1, 7-8.

Market Co. v. Hoffman, 101 U. S. 112, 116, 117.

Kohlsaat v. Murphy, 96 U. S. 153, 159, 160.

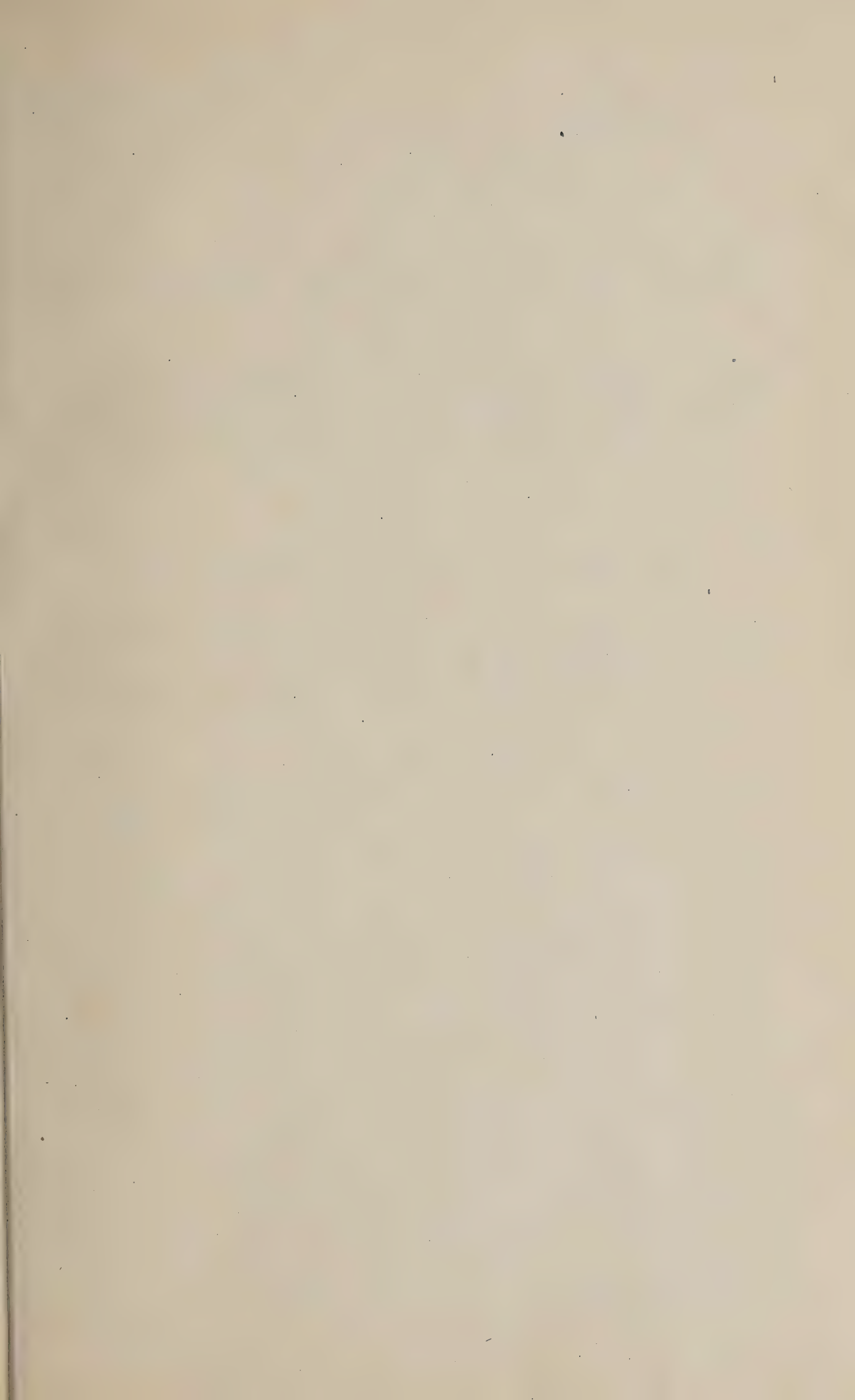
Neal v. Clark, 95 U. S. 704, 709.

It is conceded that the statute is penal and that it is not to be extended beyond the fair meaning of the language employed. But there is scant room for the application of that principle here, for there is no term or language which needs to be strained or extended to similar conditions to reach a proposed conclusion, but simply a question as to the meaning of the language actually employed.

The Act of June 29, 1906, was enacted to take the place of the Act of March 3, 1873, carried into sections 4386 to 4390 of the Revised Statutes, which it repealed. The earlier law seems not to have been the source of much litigation. It was held by Judge Key at the circuit in *United States v. East Tennessee, Virg. etc. R. Co.* 13 Fed., 642, upon the limited construction which he gave to that act, that it did not apply to the transportation of live stock from one station to another in the same State. And in *United States v. Boston & A. R. Co.*, 15 Fed. 209, it was held by Judge Nelson, also at the circuit, in a case where a large number of animals had been shipped, that the statute could not be fairly construed as making the unlawful confinement of a single animal a separate offence, and that the confinement of the entire number of animals was a single offence. It does not appear whether in that case there was more than one owner or more than one consignment. And that law did not contain the provision in the new law which allows the prolongation of the confinement of the animals upon the consent of the shipper. In *United States v. Louisville & N. R. Co.*, 18 Fed. 480, Judge Key held that the time during which a preceding carrier had kept the stock confined without unloading must be counted against the second carrier, but that the latter was not liable for the continued confinement by a subsequent carrier for a period which with the time of the confinement by the preceding carrier would extend beyond the prescribed twenty-eight hours. In *Newport News & M. Val. Co. v. United States*, 61 Fed. 488, it was held by this court that the carrier could not excuse itself upon the ground of the occurrence of an "accidental cause," where, as in that case, it was an accident on the road due to its own negligence. In *United States v. Harris*, 85 Fed. 533, it was held

by the Circuit Court of Appeals for the Third Circuit that a receiver in charge of a railroad under an order of a court was not included in the statute as one charged with the duty and so liable to the penalty, for the reason that only "railroad companies" were mentioned in that act, a matter which is cured by the later act; and the Supreme Court affirmed that ruling in the same case, 177 U. S. 305. In the case of *United States v. St. Louis & S. F. R. Co.*, 107 Fed. 870, it was held by Judge Rogers that upon the facts in that case, the unlawful confinement of all the animals on a certain train constituted but a single offence. Those facts were that the train was made up of several cars each containing part of an entire shipment made by the same party to the same consignee. In that case, the judge came to that conclusion in the absence of the light given by the new law by the provision we have emphasized. However, we think he was right, though he reached his conclusion by lights more dim than are now available. We refer to these cases because they are cited. But they really give little or no assistance upon the particular question with which we have to deal.

For the reasons we have given, we conclude that the judgments should be reversed and further proceedings be had in the court below in accordance with this opinion.



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 3.

GEO. P. McCABE, Solicitor.

“THE TWENTY-EIGHT HOUR LAW” HAS THE INCIDENTS OF A CIVIL ACTION.

Opinion of the Circuit Court of Appeals for the Sixth Circuit on Petition for Rehearing, in Cases Involving Violations of the Act of Congress of June 29, 1906 (34 Stat., 607), Commonly Known as “The Twenty-eight Hour Law.” For Original Decision of Circuit Court of Appeals, referred to here, see Circular No. 2, Office of the Solicitor.

Nos. 1770 and 1771.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

THE UNITED STATES OF AMERICA	}	Error to the District Court of the United States for the Southern District of Ohio.
v.		
THE BALTIMORE & SOUTHWESTERN RAILROAD COMPANY.		

Decided March 14, 1908.

Before SEVERENS and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

SEVERENS, Circuit Judge, delivered the opinion of the court.

Since our opinion in these cases was filed, upon which we directed a reversal of the judgment, counsel for defendant in error, upon their attention being drawn to certain decisions of the Supreme Court of the United States, to which we shall presently refer, and conceiving that they militated against the right of the United States to remove these cases into this court by writ of error, moves for a rehearing to the end that the question of the jurisdiction of this court may be considered, and if found not to exist, that the writs of error be dismissed. No doubt, the objection is one which we ought to consider and act upon if presented at any time before we lose control of the cases. The objection is that these are criminal cases, and it is urged that a writ of error will not lie at the instance of the Government in a criminal case. The second of these propositions can not be denied. The law was so settled in *United States v. Sanges*, 144 U. S. 310. But the question remains whether these are criminal cases within the meaning of that rule.

The petition in each case was for the recovery of a penalty and the actions are in the similitude of the common law action of debt, the form being simplified by the rules of code pleading. Section 4 of the Act of Congress upon which the actions are based provides, "That the penalty created by the preceding section shall be recovered by civil action in the name of the United States in the circuit or district court," etc. The contention that these are criminal cases and that therefore the United States can not have a writ of error is said to find support in the decisions of the Supreme Court in *Boyd v. United States*, 116 U. S. 616 and *Lees v. United States*, 150 U. S. 476. In both of these cases the court was considering the immunities secured to defendants by the constitutional provisions of the Fourth and Fifth Amendments in the Boyd case, and the Sixth Amendment in the Lees case. It was said that such actions were "criminal in their nature." And it was because of that similitude, that having regard to the principle and purpose of the constitutional provisions, the court held they should be applied. In the present case no such considerations apply. No right secured by the Constitution is affected. In cases not so affected the question would be whether the statute intends that the penalty shall be recovered only by conviction upon an indictment, or may be recovered by a civil action. This distinction and the consequences are considered with attention by Mr. Justice Strong in *United States v. Claflin*, 97 U. S. 546. The subject under discussion was directly involved in the case of *United States v. Zucker*, 161 U. S. 475. That was a civil action brought by the United States to recover the value of certain merchandise which it was claimed had been forfeited in consequence of the violation of the Customs Act. Upon the trial the Government offered in evidence a deposition taken in France. The defendant objected that he was entitled to be confronted by the witness because the action involved the commission of a criminal offense. The court below sustained the objection. But the Supreme Court upon a writ of error sued out by the United States held that this was error and reversed the judgment. Mr. Justice Harlan in delivering the opinion of the court canvassed the Boyd and the Lees cases and pointed out their inapplicability. It would seem that the Zucker case presented even better ground for the objection made by the defendant in that case than the ground for the objection here. Moreover, it is significant that in the Zucker case, the writ of error was sued out by the United States and the cause was entertained and decided on its merits. It seems hardly possible to think that if the court had regarded such an action as a criminal proceeding, it would have done otherwise than to have simply dismissed the writ of error on its own motion. So too in the Claflin case, *supra*, the writ of error was sued out by the United States and the cause was considered on its merits.

The action of debt has long been used, and regarded as the appropriate remedy for the collection of penalties prescribed for the violation of statutes:

Atckeson v. Everett, Cowper, 383.

Stockwell v. United States, 13 Wal. 531.

Lebanon v. Alcott, 1 N. H. 339.

Garman v. Gamble, 10 Watts. Pa. 382.

Ordway v. Central Nat. Bank, 47 Md. 217.

Webster v. People, 14 Ill. 365.

One further observation; the rule that the Government may not have a writ of error is a rule of the common law, and not the subject of a constitutional guaranty. It is therefore subject to modification by the Legislature. Congress has provided in the present case that the remedy shall be by a civil action, and the fair import of its meaning would seem to be an action having the ordinary incidents of a civil action, among which is the right to have the judgment reviewed.

Petition denied.

O

Issued May 14, 1908.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 4.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinion of Judge Landis of the Northern District of Illinois in Certain Cases Involving Violations of the Act of June 29, 1906 (34 Stat., 607).

SYLLABUS OF THE OPINION.*

1. Adoption of practice by carriers of asking shippers to execute 36-hour request practically abrogates the 28-hour law and substitutes a 36-hour law, in derogation of the intent of Congress, though perhaps not in open violation of the letter of the act.

2. "Willfully" was not used by Congress in the penal section of the act to denote an evil intent, a bad or malignant heart, or a vicious intent to injure, but rather as synonymous with "voluntarily" or "intentionally," and the intent seems to have been to require the imposition of the penalty in all cases of confinement beyond the prescribed period, except only when noncompliance with the act results from storm or from accidental or other unavoidable cause which can not be anticipated or avoided by exercise of due diligence and foresight.

3. Due diligence and foresight require the carrier to equip, maintain, and operate its road in such way as railroad experience has shown is reasonably necessary to avoid confinement beyond the prescribed time.

4. Failure to provide unloading stations, congested traffic conditions reasonably to be anticipated from past experience, and breakdowns en route resulting from negligent operation or omission to furnish properly equipped and inspected engines and cars, are not accidental or unavoidable causes which can not be anticipated and avoided by due diligence and foresight.

5. In the carriage of sheep, when the 28-hour limit expires at night, the carrier may continue them without unloading until the expiration of 36 hours, but at the expiration of the 36 hours, even in the night, the sheep must be unloaded and can not be continued in transit until daylight. Where the 36-hour period will expire in the nighttime, the carrier should unload during the preceding day.

6. Each shipment confined beyond the statutory period is a separate offense, the act providing that each *shipper* may, by request, prolong the period of confinement of his shipment to 36 hours.

* Not by the court.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION.

UNITED STATES

vs.

A., T. & S. F. Ry. Co.

C. & N. W. Ry. Co.

C., M. & St. P. Ry. Co.

I. C. R. R. Co.

C., R. I. & P. Ry. Co.

C., B. & Q. Ry. Co.

} Opinion rendered May 4, 1908.

In re violations of the Twenty-eight Hour Law.

EDWIN W. SIMS, U. S. Attorney, BEN DAVIS, Assistant U. S. Attorney, for the United States.

JAMES L. COLEMAN, for A., T. & S. F. Ry. Co., SAMUEL A. LYNDE, for C. & N. W. Ry. Co., JOHN A. RUSSELL, for C., M. & St. P. Ry. Co., JOHN G. DRENNAN, for I. C. R. R. Co., BENJAMIN S. CABLE, for C., R. I. & P. Ry. Co., CHESTER M. DAWES, for C., B. & Q. Ry. Co.

LANDIS, *District Judge*: In the matter of the United States versus the A., T. & S. F. Ry. Co., the Chicago & Northwestern Railway Company, the Illinois Central Railroad Company, the Chicago, Milwaukee & St. Paul Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Burlington & Quincy, being actions to recover penalties under the statute commonly known as the Twenty-eight Hour Law, and having been submitted to the court, mainly on pleas of guilty, but, as in the case of the Northwestern Road particularly, to some extent on pleas of not guilty, and a stipulation of facts, supplemented by evidence introduced by the defendant in open court.

SUMMARY OF THE ACT.

This statute, which succeeded the old statute on the same subject, and which had been in force for about thirty years without accomplishing anything except its own discredit by reason of its too drastic provisions, was passed in 1906. It provides that no railroad company, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee, etc., shall confine cattle, sheep, swine, or other animals in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours, without unloading the same in a humane manner into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight. Provided that on the written request of the owner or person in custody of that particular shipment, which written request shall be separate and

apart from any printed bill of lading or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement the time consumed in loading and unloading shall not be considered, but the time which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated; provided that it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime, in case of sheep, the same may be continued in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

Section 3 is the penal section: Any railroad company, express company, car company, common carrier other than by water, etc., etc., which knowingly and willfully fails to comply with the provisions of the preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars.

This is followed by a section specifying the district where the suit may be brought and by a repeal of the former act.

THIRTY-SIX HOUR EXTENSION REQUEST.

It appears from the testimony and from the facts presented by the several stipulations that the various stock carrying railway companies centering here have adopted the practice of requesting the shipper at the time he turns over his stock for transportation to execute a written request that the railway company shall not unload his stock provided the twenty-eight hour period expires while they are in transit and authorizing the carrier to continue the confinement to thirty-six hours. This has practically become the policy of the several carriers and has resulted in the practical abrogation of the twenty-eight hour law and the substitution in its place of a thirty-six hour law. I am not prepared to say that Congress did not contemplate that the carriers should do this thing. That Congress did so intend may be fairly inferred from the language of the statute, and that Congress did not so intend may also be as fairly and as rationally inferred. My own notion is that Congress intended to pass a twenty-eight hour law.

MEANING OF "WILLFULLY"—ACCIDENTAL AND UNAVOIDABLE CAUSES— DUE DILIGENCE AND FORESIGHT.

For the Chicago & Northwestern Railway Company it has been urged that there should be a finding in favor of that company for the reason, as claimed, that the evidence does not show the defendant's failure to comply with the law to have been willful. That is to say, the failure is not shown to have been dictated by a vicious intent to do an evil

thing. In support of this contention two court decisions are cited, namely, *Felton v. U. S.*, 96 U. S. Supreme Court Reports, page 699, and *U. S. v. The Louisville & Nashville Railroad Company*, 156 Fed. Rep., cited in counsel's brief, page 863, but found at page 195 or 182 or 193 of the volume referred to. In counsel's brief, referring to this case, the statement is made that in another district the court held that in a prosecution of this kind this kind of willfulness must be shown by the evidence before a conviction can be had, and that the court had under consideration what the counsel in his brief refers to as the thirty-six hour law. I can not find any case in which the court referred to laid down that rule in considering this statute. I do find in the decisions under the Safety Appliance Act where the court gets close to this question with a line of reasoning to which it is impossible for me to subscribe. The Supreme Court authority in *Felton v. U. S.*, referred to in counsel's brief, dealt with a prosecution for an alleged violation of the law which penalized the commission of fraud upon the public revenue. The thing prohibited was an act on the part of a distiller of whiskey designed to evade the payment of Government tax. The statute provided that if the distiller *willfully* did the thing prohibited, he should be punished. The facts showed (and the jury so found specially) that the defendant acted in the utmost good faith to prevent the waste and destruction of a considerable amount of property on which the Government would have lost its revenue had the defendant not proceeded as he did. The Supreme Court held that this negated the charge that the defendant *willfully* sought to defraud the public revenue.

But I am unable to see the application of this ruling here. While it is true that the penal section of the act now under consideration requires the imposition of the penalty on a carrier who knowingly and *willfully* fails to comply with the provisions of the law, it clearly appears from an examination of the first section, which defines the thing prohibited, that Congress did not use the word "willfully" in the penal section as denoting an evil intent or a bad and malignant heart on the part of the carrier. Read together, those two sections provide that any carrier that shall knowingly and willfully confine live stock in cars for a period longer than twenty-eight consecutive hours, unless prevented from unloading by storm or other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight, shall for every such offense be liable to the penalty.

In the selection of this language Congress could not have inserted the word "willfully" as implying a vicious intent to injure, for certainly Congress did not even suspect that any transportation company would ever confine live stock beyond the period prescribed for the deliberate purpose of inflicting injury on the stock or of imposing a loss upon the shipper or deteriorating the product of the slaughterhouse. It is more

rational to conclude that Congress used the word as synonymous with "voluntarily" or "intentionally" and bearing in mind the object sought by the law, the legislative intent seems to have been to require the imposition of the penalty in all cases of confinement beyond the period prescribed except only when resulting from storm or from accidental or other unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight; and in my opinion, due diligence and foresight require the carrier to equip and maintain and operate its road in such a way as railroad experience has shown is reasonably necessary to avoid confinement beyond the time prescribed. Failure to provide unloading stations, congested traffic conditions reasonably to be anticipated from past experience, and breakdowns en route resulting from negligent operation or omission to furnish properly equipped and inspected engines and cars, are not accidental or unavoidable causes which can not be anticipated and avoided by due diligence and foresight.

LIMITATION OF EXCEPTION IN RESPECT TO SHEEP.

There is a special provision of this law relating to sheep. After providing that the length of confinement shall not be longer than twenty-eight hours, except where the shipper authorizes it by a written request extending it to thirty-six hours, section 1 proceeds:

In estimating such confinement the time consumed in loading and unloading shall not be considered, but the time which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated; provided, that it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime, in case of sheep, the same may be continued in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

For the Northwestern Company it is contended that it was the intention of Congress as thus expressed to except sheep from the operation of the thirty-six hour provision when the thirty-six hour period expired in the nighttime, it being urged that the provision "subject to the aforesaid limitation of thirty-six hours" should be rejected by the court as meaningless. In other words, the claim is that if the thirty-six hour period expire one hour after the day has expired, the carrier is authorized to continue the confinement of such animals until that night ends and the next day has begun. I am unable to find any justification for this argument in the express provision referred to, and certainly it is squarely opposed to the great object sought by the law as plainly disclosed by the language of the act taken as a whole. To my mind the meaning of this express provision is that where the twenty-eight hour period expires in the nighttime, the carrier is authorized to continue

the confinement of sheep for thirty-six hours, even without the shipper's request, but not longer than thirty-six hours, as declared by the proviso "subject to the aforesaid limitation of thirty-six hours."

Where the thirty-six hour period will expire in the nighttime, the carrier should unload during the preceding day. The court will not impute to Congress the idle use of words in a law prescribing a rule of conduct and imposing penalties for its violation, at least where the common and ordinary meaning of the words employed is in harmony with the other provisions of the law, and their exclusion would defeat its manifest purpose.

EACH SHIPMENT CONSTITUTES A SEPARATE OFFENSE.

For the Santa Fe Company the argument has been made that the act does not authorize more than one prosecution for confinement of several shipments of stock hauled in one train. Counsel has submitted to the court, in support of his claim, a number of authorities construing the statutes which tend to support his position. Some of them are rebate cases where courts have held that where the Interstate Commerce Law forbidding discrimination has been violated in favor of the shipper during a long period of time by the shipper paying the regular rate from day to day and from week to week and from month to month for many months and after the lapse of a long period of time the railroad company sends to the shipper a check paying back to the shipper part of the regular lawful rate thus paid by the shipper, that that is but one offense.

Up to this time neither the Supreme Court of the United States nor any other court authorized to lay down a rule for the guidance of this court has subscribed to that doctrine, and until that is done, being of the opinion that it is clearly not the law, I shall not adopt it as the rule of these cases. The words of this statute clearly forbid the application of that rule, providing, as the statute does, that each shipper may waive the twenty-eight hour provision so that as to his shipment the carrier may lawfully continue the confinement for thirty-six hours. The penal clause provides for an imposition of the penalty for each offense, and in my view of the law there are as many offenses as there are shipments confined beyond the period prescribed.

CONGESTED TRAFFIC CONDITIONS, BREAKDOWNS, AND WRECKS.

There have been arguments by various counsel against the imposition of the penalty in some of these cases, on the ground that traffic conditions at the Chicago terminals, breakdowns on the road, blocked crossings, and one thing and another in various instances prevented the carrier from getting the cattle to market within the time prescribed. What I have said indicates the court's mind with respect to those arguments. I am bound to say that when this was first suggested my

impression was that the proposition was not without merit but on reflection I see no escape from the conclusion that if the carrier desires a breakdown or wreck to excuse confinement beyond the period prescribed, the carrier must show that the breakdown or wreck did not result from a cause which due diligence and foresight would have anticipated and avoided. I believe that is the meaning of this law. However, in a case of that character, there should not be a penalty beyond the minimum.

ASSESSMENT OF PENALTIES.

There will be a finding against the defendant in the several cases submitted on the plea of not guilty. In most of the cases a penalty of one hundred dollars has been fixed. In others the court has departed from the standard. In consideration of special facts and circumstances disclosed, judgment will be entered for the amount specified in the memorandum filed with the clerk.

The memorandum above referred to assessed penalties in the respective cases as follows:

CHICAGO, ROCK ISLAND & PACIFIC RY. CO.

Dept. of Agriculture No.	Court No.	Amount of fine.	Dept. of Agriculture No.	Court No.	Amount of fine.	Dept. of Agriculture No.	Court No.	Amount of fine.
673	9845	\$150.00	943	9886	\$200.00	856	9921	\$100.00
763	9854	100.00	939	9887	200.00	1050	9925	200.00
622	9856	150.00	945	9888	200.00	1146	9929	200.00
934	9873	250.00	770	9889	200.00	1147	9930	150.00
944	9874	250.00	849	9890	100.00	1148	9931	100.00
881	9875	100.00	848	9891	100.00	1149	9932	100.00
789	9876	100.00	847	9892	150.00	1177	9933	100.00
769	9877	200.00	940	9893	150.00	1185	9934	100.00
790	9878	100.00	623	9897	150.00	1178	9947	200.00
846	9879	100.00	968	9898	200.00	1227	9952	100.00
855	9880	100.00	967	9899	150.00	1263	9957	150.00
860	9881	150.00	942	9904	150.00	1264	9958	100.00
788	9882	100.00	941	9905	150.00	1265	9959	100.00
791	9883	100.00	985	9908	200.00			
969	9884	100.00	1092	9917	100.00			
845	9885	200.00	1093	9918	100.00			6,450.00

CHICAGO, BURLINGTON & QUINCY RY. CO.

Dept. of Agriculture No.	Court No.	Amount of fine.
1208	9949	\$100.00
1244	9956	100.00
		200.00

CHICAGO, MILWAUKEE & ST. PAUL R. R. CO.

Dept. of Agriculture No.	Court No.	Amount of fine.	Dept. of Agriculture No.	Court No.	Amount of fine.	Dept. of Agriculture No.	Court No.	Amount of fine.
385	9827	\$150.00	725	9859	\$100.00	627	9864	\$100.00
624	9857	100.00	674	9862	300.00			
723	9858	100.00	724	9863	100.00			950.00

ATCHISON, TOPEKA & SANTA FE RY. CO.

Dept. of Agriculture No.	Court No.	Amount of fine.	Dept. of Agriculture No.	Court No.	Amount of fine.	Dept. of Agriculture No.	Court No.	Amount of fine.
801	9894	\$100.00	1314	9972	\$100.00	1316	9974	\$100.00
880	9955	250.00	1315 *	9973	100.00			650.00

ILLINOIS CENTRAL R. R. CO.

1035	9907	\$100.00	1183	9939	\$150.00	1260	9962	\$100.00
1061	9909	100.00	1222	9951	150.00			
1157	9925	150.00	1243	9960	100.00			1,100.00
1182	9938	150.00	1245	9961	100.00			

CHICAGO & NORTHWESTERN RY. CO.

771	9896	\$300.00	1159	9927	\$200.00	1267	9966	\$100.00
1006	9910	100.00	1160	9928	200.00	1286	9967	100.00
1007	9911	100.00	1179	9935	100.00	1287	9968	100.00
1008	9912	100.00	1180	9936	100.00	1288	9969	100.00
1009	9913	100.00	1181	9937	200.00	1289	9970	100.00
1010	9914	100.00	1189	9948	150.00	1290	9971	250.00
1011	9915	100.00	1221	9950	150.00			
1005	9916	100.00	1261	9963	150.00			3,600.00
1156	9924	150.00	1262	9964	150.00			
1158	9926	150.00	1266	9965	150.00			

Total fines, \$12,950.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 5.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinion of Munger, J., of the District of Nebraska, Overruling Demurrer of Defendant
in Cases Involving Violations of the Act of June 29, 1906 (34 Stat., 607).

SYLLABUS OF THE OPINION.*

1. It is competent for Congress to provide for the recovery of penalties imposed for violation of a public statute, either by a criminal or a civil action. In the Twenty-eight Hour Law Congress has specifically denominated actions under this statute civil actions.

2. Prosecutions under this statute may be brought in any one of three districts: The district where the offense is committed; the district where the defendant resides; or the district where it carries on its business.

3. *Iowa v. Chicago, Burlington & Quincy R. R. Co.* (37 Fed., 497) distinguished.

4. Prosecutions under this statute are not criminal in the sense that they can be brought only in the State or district where the offense was committed.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF
NEBRASKA.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
CHICAGO & NORTHWESTERN RAIL-
WAY COMPANY, Defendant.

Opinion rendered May 15, 1908.

MEMORANDUM OPINION.

In re violations of the Twenty-eight Hour Law.

MUNGER, *District Judge*: This action is brought in the Omaha Division of the District Court for the District of Nebraska to recover the penalty provided by an Act of Congress, approved June 29th, 1906 (U. S. Stat. at L., vol. 34, p. 607).

The petition contains four counts or causes of action. The first is based upon a shipment of two cars of sheep from Belle Fourche, South

* Not by the court.

Dakota, to Omaha, Nebraska, and charges that said sheep were confined in said cars from four o'clock p. m., September 29th, 1907, until three o'clock p. m., of October 1st, following, without being unloaded; that they were on said October 1st, at three p. m., unloaded at Long Pine, Nebraska. The second, third, and fourth causes of action are of a similar character, it being unnecessary to state the specific acts for the purposes of a decision at this time.

The petition alleges that the defendant is a railroad corporation, organized under the laws of the States of Illinois and Wisconsin, a common carrier other than by water, extending from one State into another.

The defendants have filed a demurrer on the ground that the Omaha division of this court has no jurisdiction of the action.

The act of Congress in question provides that any common carrier, described therein, who fails to comply with the provisions of the act shall forfeit and pay a penalty of not less than one hundred and not more than five hundred dollars. It is further provided that the penalty "shall be recovered by civil action in the name of the United States, in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business."

SUMMARY OF ACT OF FEBRUARY 27, 1907.

By an act of Congress approved February 27th, 1907 (U. S. Stat. at L., vol. 34, p. 997), the district of Nebraska was divided into judicial divisions, and in said act it was provided "that all prosecutions for crimes or offenses committed after the passage of this act shall be cognizable only in the division of the district where the same was committed, unless the court, upon application of the defendant, etc., shall transfer the cause to some other division."

Relative to civil actions, it is provided "that all civil actions not of a local nature, against a single defendant, must be brought in the division where said defendant resides * * * and all issues arising in such suits shall be brought in such division, unless by consent of parties," etc. "That all civil actions of a local nature at law or in equity shall be brought in the division where the subject matter of the action is located."

In support of the demurrer, it is argued, first, that, as the penalty imposed for a violation of the statute is not for the purpose of redressing a private wrong, but for the purpose of enforcing a punishment on behalf of the sovereign, for the public welfare, that the action is distinctively criminal, and hence must be brought in the division where the offense was committed, the claim being that the petition shows the offense to have been committed within the Chadron division.

THE TWENTY-EIGHT HOUR LAW IS A CIVIL ACTION.

I have no doubt that it is competent for Congress to provide for the recovery of penalties imposed for violation of a public statute either by a criminal or civil action. If the action be a criminal action, it could only be brought by information filed by the district attorney or an indictment found by a grand jury. The act of June 29th, 1906, expressly provides that the penalty shall be recovered by a civil action, and this case is a civil action in form, though in its nature undoubtedly criminal. Yet, in determining the jurisdiction of the court, or, in other words, the venue, it is to be regarded as a civil action.

The statute in question provides that the penalty is to be recovered not only by civil action but in the district where the violation may have been committed, or the person or corporation resides or carries on business. This provision, then, provides that the action may be brought in at least one of three different districts. If the offense is committed, say, in the district of Nebraska, the action may be brought in the district of Nebraska; if the defendant resides in the State of Illinois, it may be brought in the State of Illinois, though the offense was committed in the State of Nebraska; if the defendant carries on business in the State of Iowa, it may be brought in the district of Iowa, though the offense was committed in Nebraska and the defendant resides in Illinois.

If the action is to be regarded as a criminal action, then, under subdivision 3 of section 2, article 3, of the Constitution of the United States, the action could only be brought in the State where the offense was committed.

IOWA *v.* CHICAGO, BURLINGTON & QUINCY R. R. CO. DISTINGUISHED.

That it is a criminal offense, it is urged, was held by the Circuit Court of the United States for the Southern District of Iowa, in an opinion rendered by Justice Brewer, in a case heard before him and Judges Shiras and Love. That was a civil action brought in the State court by the State of Iowa to recover a penalty for the violation of its statute, and by the defendant removed into the United States Court, and was heard upon motion to remand. A careful reading of that case discloses the fact that the question which the court determined was not whether the action was civil or criminal, but whether it was civil or criminal in its nature, the removal statute providing "that any suit of a civil nature, at law or in equity, etc., may be removed." The court held that, while the action was a civil one in form, its nature was criminal, and hence did not come within the terms of the removal act, which did not give the right of removal to all civil actions but only actions which were civil in their nature, and the court held that the nature of the action was criminal, although civil in form, and, as the removal statute dealt with the nature of the cause of action, and not with the form of the

action, and, as the action in that case was not civil in its nature, although it was in form, it did not come within the removal statute, and hence was not removable. (*State of Iowa vs. C., B. & Q.*, 37 Fed., 497.)

Justice Brewer, in the opinion, refers to the case of *Ames vs. Kansas*, 111 U. S., 449, the first paragraph of the syllabus of which is as follows: "A remedy by information in the nature of quo warranto, though criminal in form, is in effect a civil proceeding." The Supreme Court held that that case was removable because it was an action of a civil nature though criminal in form.

In none of the cases cited do I think it is held that an action to recover a penalty, brought by the sovereign to compel obedience to its laws, is criminal in the sense that it can only be brought within the State or district in which the offense was committed.

VENUE OF THE ACTION.

If the defendant was a corporation organized under the laws of the State of Nebraska, and hence a resident of Nebraska, and it was sought to invoke the jurisdiction of the court for the district of Nebraska, upon the ground that the defendant was a resident of Nebraska, then I have no doubt that the action would have to be brought within the division in which the defendant resided. Or, if jurisdiction was invoked upon the sole ground that the violation of the statute was committed within the district of Nebraska, then the action would have to be brought within the division in which the offense was committed. But, in this case, the jurisdiction is invoked, or at least may be sustained, on the ground that the defendant carries on business in the district, and I think it clearly appears from the petition that it carries on the business of a common carrier in several of the judicial divisions, the Omaha Division being one of them, and in such case I think the action may be brought in any division of the district in which the defendant carries on its business.

This holding does not in any way conflict with the act referred to of February 27th, 1907, dividing the district of Nebraska into judicial divisions; that act relates to proceedings in rem, in which the action is of a local nature, and to transitory actions, or actions not of a local nature, where the defendant is a resident of the district; and is not in conflict with the act of June 29th, 1906, providing for suits against a nonresident defendant.

For these reasons, the demurrer is overruled.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 6.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

SYLLABUS OF THE OPINION.*

1. Carriers—Transportation of live stock—Confinement—Action for penalty—Exceptions.

The Act of Congress approved June 29, 1906 (34 Stat., 607), prohibits confinement of live stock in transit for more than twenty-eight hours, unless unloading is prevented by storm or other accidental or unavoidable causes, which can not be avoided or anticipated by the exercise of due diligence and foresight. The Act also imposes penalties recoverable in a civil action in the name of the United States. *Held*, that, though the exception is contained in the enacting clause of the Act, the Act created a general offense, and not one limited to particular conditions, and hence a complaint to recover penalties imposed was not defective for failure to negative the exception.

2. If a complaint under this statute contains the necessary allegation that the carrier “willfully” confined the live stock, such allegation in itself is sufficient to negative the exceptions in the Act.

3. The burden is not on the Government to show that the carrier was not prevented by storm or other accidental or unavoidable cause, which it could not have avoided by the exercise of due diligence and foresight within the exception from liability created by the statute.

4. It is immaterial that a part of the confinement elapses while the stock is in the possession of a connecting carrier; the carrier having possession of the stock is required to unload, feed, and water them as soon as the time limit is reached.

5. A complaint under the statute which fails to charge that a defendant carrier “knowingly and willfully” confined live stock in its possession, which were confined upon a connecting carrier’s road and upon the road of the defendant for longer than twenty-eight hours, is fatally defective.

IN THE CIRCUIT COURT OF THE UNITED STATES, NINTH JUDICIAL CIRCUIT, FOR
THE DISTRICT OF IDAHO, CENTRAL DIVISION.

UNITED STATES OF AMERICA, PLAINTIFF,	}	Opinion.
<i>v.</i>		
OREGON SHORT LINE RAILROAD COMPANY, a corporation, Defendant.		

ON DEMURRER.

N. M. RUICK, *United States District Attorney, for Plaintiff.*

P. L. WILLIAMS and D. WORTH CLARK, *for Defendant.*

DIETRICH, *District Judge*, sustaining demurrer:

This is an action to recover a penalty for the violation of what is commonly known as the “Twenty-eight Hour Law” (Act of June 29,

* Not by the Court.

1906, 34 Stat. L., 607). The salient facts alleged are that the defendant operates a line of railroad connecting with a line belonging to the Union Pacific Railroad Company at Green River, in the State of Wyoming, and extending westward to the town of Huntington, in the State of Oregon. On September 13, 1907, it received from the Union Pacific Railroad Company cars containing 660 head of swine, which, at the time they were turned over to the defendant, had been confined continuously for nineteen and a half hours; and thereupon the defendant, while transporting them to Montpelier, Idaho, confined them, without food or water, for the additional period of nineteen and a half hours, making a total continuous confinement, without food or water, of thirty-nine hours. By the statute confinement of live stock in transit for more than twenty-eight hours is prohibited, "unless (unloading is) prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight;" and it is contended by the defendant that the plaintiff, in order to state a cause of action, must expressly negative the contingencies contemplated by this provision.

EXCEPTIONS NEED NOT BE NEGATIVED IN COMPLAINT.

Apparently the precise question is for the first time submitted for determination, although other features of the act and the procedure for its enforcement have had judicial consideration; the results being not entirely harmonious. While the act is penal in its nature, it expressly provides that the penalty prescribed "shall be recovered by civil action in the name of the United States," and there exists a difference of opinion as to whether the principles of civil or of criminal procedure apply. The opposing views are well exemplified in two recent decisions—*United States v. L. & N. R. Co.*, 157 Fed., 979, where the rules of criminal law were rigidly adhered to, and *United States v. Southern Pacific Railway Company*, 157 Fed., 459, where the jury was instructed to return a verdict according to the preponderance of the evidence. The answer to the present question is, however, in no wise dependent upon an election between these contending theories. Whether that which the plaintiff asserts be denominated "a public offense" or "a cause of action" is of slight importance. In either case it is a creature of the statute. In pleading a statutory cause of action it is, as a general rule, incumbent upon the plaintiff to set forth all that is necessary to constitute a complete description of the right. Every ingredient or element thereof as it is defined by the statute must be alleged. Neither more nor less is required in an information or indictment. Conceding that, if the clause relied upon were in a proviso or in a subsequent section, the complaint would be sufficient, counsel for the defendant contends that it is within the "enacting clause" of the statute, and that, therefore, the burden is upon the plaintiff to negative by appropriate

avermment the existence of the excepted conditions. The rule was formerly thus stated:

If the exceptions themselves are stated in the enacting clause, it will be necessary to negative them in order that the description of the crime may in all respects correspond with the statute.—1 Chit. Crim. Law, 283.

DECISIONS IN POINT REVIEWED.

Upon its face the rule seems simple enough, but the difficulty lies in its application. If by “enacting clause” reference were made to some particular portion of the statute susceptible of physical identification, either by its form or its relative position in the act, plainly it would be a comparatively simple matter to determine whether the exception is within or without the enacting clause; but unfortunately such is not the case. Symmetrical statutes, perfectly arranged, are rarely found, and, if the phrase ever was properly employed as designating the section, and the whole section, and only the section, in which the offense is defined, its meaning has been materially modified. In *United States v. Cook*, 84 U. S., 168, it is said:

Commentators and judges have sometimes been led into error by supposing that the words “enacting clause,” as frequently employed, mean the section of the statute defining the offense, as contradistinguished from a subsequent section in the same statute, which is a misapprehension in the term, as the only real question in the case is whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and, if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but, if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in the succeeding sentence.

In *Territory v. Burns* (Mont.), 9 Pac., 432, it is held that—

The enacting clause of the statute is not necessarily alone or only that which purports to be such, but comprehends every part of the statute which should be stated in order to define the offense with clearness.

In *State v. Bevins* (Vt.), 41 Atl., 655, it is said:

The term “enacting clause” should be construed to mean all parts of the statutes which create and define the offense, whether in one or more sections or acts.

Also:

Whether the exception is in the first section of the statute which enacts the offense, or in a subsequent section, or in an independent

statute, is not determinative of the question, for some of our cases hold that the exception need not be negatived when it is in the section of the statute which creates the offense.

These expressions are fairly representative of the prevailing view, and thus construed the phrase is a flagrant misnomer; and it follows that the rule itself, if it does not tend to mystify and confuse, is of little value as a guide. To say that the pleader must allege that, and only that, which is stated in the enacting clause, is to make no progress, but is only to reason in a circle, for by definition the enacting clause is that, and only that, which the pleader must allege. Whether in the beginning or at the end, the material inquiry must be: What are the constituent elements or the essential ingredients of the offense or right of action as the same is defined by the statute? If the exception is so incorporated in the statutory definition that it in fact becomes a part of the description of the offense, to omit it leaves the pleading defective in a material respect, because the right of action or offense is not accurately and fully described.

Applying this principle, the answer to the present inquiry is not free from difficulty. The form of the clause and its proximity and close grammatical relation to that part of the section which is clearly descriptive of the offense strongly support the defendant's contention. But in my view, while these are material, they are not controlling, considerations. A test of great practical value is: Does the statute create a general offense, or one limited to particular conditions? If the former, the exception need not be negatived, while in the latter it must be. Wharton, *Crim. Pleading*, 241.

Here there is no room for doubt as to the legislative intent. The general purpose was to prohibit the inhumane treatment of domestic animals in the possession of common carriers. The statute denounces in comprehensive terms the confinement of live stock for a period in excess of twenty-eight hours. The offense is not limited to certain conditions. Confinement in excess of twenty-eight hours under any circumstances was deemed to be a cruelty. By the excepting clause a concession was made to necessity, and the carrier is protected against punishment for doing that which it could not avoid. The offense is thus not defined or qualified, but an excuse only is afforded to the carrier. And I therefore conclude the exception need not be negatived. See *Sholp v. United States*, 81 Fed., 694.

Independent of the reasons already given, there is another consideration which, in my judgment, must lead to the same conclusion. Section 3 of the act provides that every common carrier "who knowingly and willfully fails to comply with the provisions" of the law shall be liable for the penalty therein prescribed. Admittedly, in order to bring the defendant within the statute, it is necessary to allege that in violating the law its conduct was willful. The exception under consideration

excuses the carrier only in cases where its failure is due to "causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." If it is prevented by such causes, its failure to comply with the law is not willful, and therefore the allegation that it acted willfully in itself negatives the exception. *Newport News & M. Val. Co. v. United States*, 61 Fed., 488.

Before passing to a consideration of other phases of the demurrer, it may not be improper for me to say that I think counsel, both for the Government and for the defendant, have overvalued the importance of this question of pleading in the prosecution and the defense of cases based upon the statute; and this is probably due to the assumption that, if the plaintiff is required to plead against the exception, it must also assume the burden of proof. Obviously it would be next to impossible for the Government to anticipate and by proof eliminate all the possible contingencies covered by the excepting clause. Even if it were held to be necessary for the plaintiff to plead against the exception, it might still be relieved from making proof, because it would thus plead a negative, and, further, because it pleads the absence of conditions, the evidence concerning which in many cases would be exclusively within the knowledge of the defendant. These exceptions to the general rule of proof are thus stated by Mr. Justice Story in *United States v. Hayward*, 2 Gall., 485, 26 Fed. Cases No. 15336:

But in other cases, as where the negative does not admit of direct proof, or the facts lie more immediately within the knowledge of the defendant, he is put to his proof of the affirmative. And, where the general facts which constitute a forfeiture within a statute are proved, and there are exceptions to its operation in particular cases, the better opinion certainly is that the party who would avail himself of the exception must prove it, although from the forms of pleading it may be necessary to negative every exception in the indictment or information. Such negative allegation is in such cases to be repelled by affirmative proof on the other side. * * * Without pretending to reconcile all the dicta in the books, it seems to me that in respect to negative allegations the reasonable rule is that the burthen of proof shall rest on the party who holds the affirmative, and especially where the facts are peculiarly within his privity and cognizance.

KNOWLEDGE REQUIRED OF DEFENDANT.

The second objection raised to the sufficiency of the complaint is that it does not allege that the defendant "knowingly" or "willfully" confined said swine for twenty-eight hours, or that it "knowingly" or "willfully" failed to comply with the law; but the charge in that respect is only that the defendant "knowingly" and "willfully" confined the swine in the cars continuously during the period intervening between the time they were received at Green River and the time they were unloaded at Montpelier, which, as already stated, was nineteen and a half hours.

The allegation is as follows:

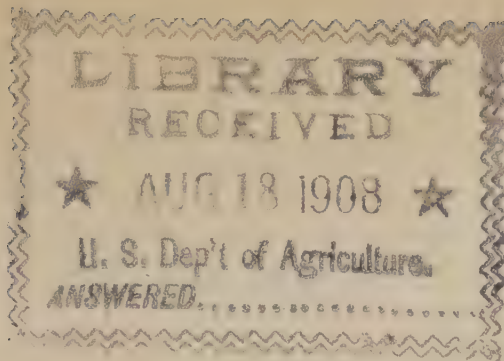
That at the time said animals were so received by said Oregon Short Line Railroad Company at Green River, as aforesaid, the same had been continuously confined in cars without unloading for a period of nineteen and one-half hours, or from 8.30 o'clock in the forenoon of September 12, 1907, and the said swine were further, and without unloading, feeding, watering, or resting the same, and while so in transit over said defendant's railroad, between Green River, Wyo., and Montpelier, Idaho, knowingly and willfully, by said defendant company, confined in said cars until half past eleven o'clock *post meridian* of the said 13th day of September, 1907.

As I have heretofore observed, the plain intent of the act is to prohibit the continuous confinement of live stock by transportation companies more than twenty-eight hours at any one time, and it is immaterial that a part of the period of confinement elapses while the stock are in the possession of a connecting carrier. It is the continuous confinement which is denounced, and, as soon as the twenty-eight hour limit is reached, it is the duty of the carrier then having possession of the stock to unload and feed and water them. While this is true, it does not follow, as a matter of course, that a carrier keeping the stock in confinement after the lapse of twenty-eight hours incurs the penalty. Only the carrier "who knowingly and willfully fails to comply with the provisions" of the law is liable to punishment. Assuming that the defendant had no knowledge, either actual or constructive, that the swine, at the time they were delivered to it, had been confined to exceed eight hours and a half, would it be contended that it "knowingly" violated the law? To state the question is to answer it. If the shipment had been made exclusively upon the defendant's line of road, it would not be doubted that, in order to state an offense, it would be incumbent upon the Government to plead that the defendant "knowingly" confined the stock for a period in excess of twenty-eight hours. But if in such a case, where it is almost impossible to imagine that the defendant could be without knowledge, it is necessary to plead that it acted "knowingly," what reason can be given for relieving the Government from pleading knowledge in a case like this, where the confinement took place in part before the stock came into the possession of the defendant? The only argument urged upon behalf of the Government is that, if the burden be imposed upon it of pleading and proving knowledge, it would sometimes be difficult for it successfully to maintain an action to recover the penalty. In no case which has come under my observation brought to recover the penalty under this act has the Government omitted to allege that the defendant "knowingly" violated the law, and no principle or rule of pleading has been called to my attention by which the plaintiff can be relieved from alleging the essential ingredients of the offense as it is defined by

the statute. In this respect the statute seems too plain to admit of construction, and the court cannot relieve the plaintiff from pleading that the defendant "knowingly" confined the swine in excess of twenty-eight hours without doing violence to the plain provisions of the law.

It follows that upon this ground the demurrer must be sustained.

O



Issued August 17, 1908.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 7.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW:

Charge to the Jury by Lewis, J., in the United States District Court for the District of Colorado, in Case Involving Violation of the Act of June 29, 1906 (34 Stat., 607).

SYLLABUS.^a

1. A suit under the Twenty-eight Hour Law is not a criminal case, and the Government is not held to proof beyond a reasonable doubt, but by a preponderance or greater weight of evidence.

2. In the case of sheep, when the twenty-eight hour limit expires in the night, the carrier may continue them without unloading until the expiration of thirty-six hours.

3. Circumstances which release the carrier from liability under the statute are provided for therein; the court and jury have no right to find exceptions outside the statute.

4. Common carriers are chargeable, under the statute, with knowledge not only of what its agents actually knew, but of what they could, by the exercise of reasonable inquiry, have ascertained.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

UNITED STATES OF AMERICA, Complainant, vs. COLORADO & SOUTHERN RAILWAY COMPANY, Defendant.	Charge given in June, 1908.
--	--------------------------------

Mr. DINES. The defendant makes a request for an instruction to charge the jury, in effect, that this being a suit for a penalty the burden is upon the Government to prove beyond a reasonable doubt a violation of the provisions of the statute.

The COURT. I will deny that request; it is not a criminal case.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

^a Not by the court.

Mr. DINES. The defendant further requests the court to instruct that before the jury can return a verdict for the plaintiff they must believe from the evidence, beyond a reasonable doubt, that the Colorado & Southern Railway Company willfully violated the provisions of this statute.

The COURT. That will be given in substance, except as to reasonable doubt.

Mr. DINES. The defendant further requests the court to instruct the jury, as a matter of law, under the statute and under the evidence there was no duty upon the Colorado & Southern Railway Company to unload this stock at any time prior to daybreak of the 5th of October.

The COURT. I think in one sense the principle you have in mind is correct; it needs certain modifications under the facts as appear from the evidence.

Gentlemen of the jury, Congress passed an act in June, 1906, relative to interstate commerce and the shipment of live stock over railroads by which it was provided that no railroad company transporting sheep, cattle, swine, and other animals from one State or Territory to another State or Territory shall confine the same in cars for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly kept pens for rest, water, and feeding for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight. And then it provides further, that if the shipper requests it, in writing, the confinement may extend to thirty-six hours, but there is not any evidence in this case that the shipper, by written request, asked that the period of confinement should be extended, so that one of the inquiries here is as to the length of time the sheep were confined and will be restricted to a period of twenty-eight hours. The act further provides that it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place of unloading subject to the aforesaid limitation of thirty-six hours; that is to say, if the time expires in the night and there is no suitable place for unloading, then without this written consent of the shipper the confinement may extend to thirty-six hours. The act then provides that if any railroad company unlawfully and willfully fails to comply with this section it shall be liable to a penalty of from \$100 to \$500.

Now, I think that the evidence in this case clearly shows that the sheep were confined more than thirty-six hours; they were loaded at the initial point of shipment at 5.15 p. m. on October 3 and were not unloaded until about 11 a. m. on October 5. This appears to be a period

of confinement of something in the neighborhood of forty hours, as I estimate it, but you are to make the estimate as to the time yourselves. It appears from the testimony that there were stock yards at Greeley where these sheep might have been unloaded; that they reached there late in the afternoon of October 4; it may have been nighttime; if so, the defendant was not required to unload them during the nighttime. But they remained in Greeley until in the neighborhood of 9 o'clock the next morning and no reason has been shown why they could not have been unloaded in these stock pens the morning of the 5th before they were hauled to Fort Collins, and I think your knowledge, perhaps, of stock will induce you to believe that while the facilities were not the best there for feeding, these sheep could have been fed in some manner by placing the feed on the ground, if necessary, and if the feed could not have been bought the night before because the stores were closed it could have been bought the next morning; but in any event it will be no excuse for the railroad company to say that although they knew that the shipment was coming they made no provision for complying with this statute when they arrived. It might have had some feed at hand if it were necessary to have feed when the stores were closed. These acts of Congress may be burdensome to railroads, but we are not concerned as to that; our duty is to enforce the law and we have nothing to do with its policy; it is for us to find whether or not the facts show a violation of the law, and if they do then the penalty necessarily follows.

EXCUSES PROVIDED BY THE STATUTE.

Now the railroad company is not absolutely bound in every contingency and at all times to comply with this act, and the law specifies the conditions under which they are excused—that is, if prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight. It is not any excuse for the railroad company to say that “we put our telegraphic service to work and got the men, but the men called went to sleep and we didn’t know where to find them.” I instruct you to disregard any such evidence so far as its being any excuse for noncompliance with this act. If this shipment had been taken out during the nighttime, then you would be entirely justified in saying that the railroad company could not be held for the penalty because there is an exemption in favor of the railroad company under such conditions. If they had arrived at Greeley in the evening, but after dark, and gone out before daylight, then, though they had not reached Fort Collins until after the thirty-six hour limit had expired, it would be clearly within this exemption. But they were confined in these cars the next morning long after daylight and taken out without unloading and complying with the provisions of the statute.

KNOWINGLY AND WILLFULLY.

Now you can not find a verdict of guilty against the railroad company unless you believe from the evidence that they knowingly and willfully failed to comply with the provisions of this statute. It is the duty of the railroad company that receives a shipment from another to use reasonable diligence in ascertaining when the live stock was put in the cars and whether or not it had been unloaded, and if unloaded before reaching the receiving carrier, how long before. The testimony shows that these sheep were not unloaded from the time they were first received in Wyoming. If the defendant company, its agents and servants who had charge of these shipments, knew that, or by the exercise of reasonable inquiry on their part could have ascertained the hour at which these sheep were loaded, and that they had not been unloaded up to the time the cars came into their possession, then they had knowledge of the facts. One is charged with knowledge not only of what he specifically and certainly knows, but what he might find out by reasonable inquiry. He is charged not only with knowledge of specific facts that come to his personal observation, but with such facts as by reasonable inquiry it is his duty to attempt to ascertain whether he ascertains them or not, and therefore, if the defendant company knew, or could by the exercise of reasonable inquiry have ascertained, that these sheep had not been unloaded from the time they were first put upon the cars, at 5.15 p. m. October 3, then it had knowledge of the fact and its failure thereafter to comply with the statute, if it did fail, was a willful failure, and you should find a verdict against the defendant.

DEGREE OF PROOF REQUIRED.

The burden is on the Government to prove to your reasonable satisfaction by a preponderance, or greater weight of the evidence, the charge that it makes against the railroad company. It is not required, however, to prove the facts to your satisfaction beyond a reasonable doubt; the rule in criminal cases does not apply here. The facts are for your determination; you are to decide what the facts are in this case; you are not to be guided by what the court may think about the facts; they are solely and exclusively a matter for you to determine. If you find a verdict in favor of the United States, you will assess a penalty and fine against the defendant of not less than \$100 and not more than \$500, and state the amount of such fine in your verdict. If you find in favor of the defendant, you will simply state in your verdict that you find the defendant not guilty; and when you have reached a verdict your foreman, whom you will select, will sign it.

Mr. DINES. Defendant excepts to that portion of the charge directing the jury to disregard efforts of the railroad company to move this shipment of stock after it arrived at Greeley.

The COURT. I did not say that the jury should disregard its efforts to get the shipment out after it arrived at Greeley.

Mr. DINES. Defendant excepts to that portion of the charge which submits to the jury the question of whether the railroad company had knowledge of the time of loading of these sheep and as to whether or not they had been unloaded in transit, for the reason that this is a part of the case which the Government is affirmatively required to make and there is an absence of evidence upon it.

Defendant excepts to that portion of the charge which requires the Government to make its case only by a preponderance of the evidence and not beyond a reasonable doubt.

Defendant excepts to that portion of the charge which leaves it to the jury to assess the fine or penalty, it being, as I think, a matter for the court to fix the penalty and only for the jury to find as to the question of fact relating to whether or not there was a violation of the statute.

The COURT. I might further advise you, gentlemen of the jury, that the act further provides if the owner of the animals does not take care of the feeding, or pay for it, it is held as a charge by the railroad company against the shipper, consignor, or owner of the stock.

And thereafter and on the same day the jury returned into court its verdict finding the defendant guilty and assessing a penalty against the defendant in the sum of \$400.

Mr. DINES. Defendant excepts to the verdict.





United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 8.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinions of Wolverton, J., District of Oregon, in Cases Involving Violations of Act of June 29, 1906 (34 Stat., 607).

SYLLABUS OF OPINIONS.*

1. The provision in the Statute that live stock in transit may be continued for thirty-six hours at the written request of the shipper held constitutional.
2. The unit of violation under the Statute is the shipment.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

UNITED STATES OF AMERICA	} No. 3161.
v.	
THE OREGON RAILROAD AND NAVIGATION COMPANY.	

JAMES COLE, Assistant United States Attorney.

W. W. COTTON, A. C. SPENCER, and JAMES G. WILSON for Defendant.

WOLVERTON, *District Judge.*

This is an action for the recovery of a penalty for violation of the Act of June 29, 1906 (34 Stat., 607). The charge is that the defendant company received and loaded upon a car a consignment of eighty-one hogs, and carried them in continuous transportation without unloading for feed and rest, for more than twenty-eight hours, all without the written request of the owner, the custodian, or the consignee thereof authorizing an extension of the time of confinement to thirty-six hours. The complaint is challenged by a demurrer, and there is presented the single question whether the act under which the action is brought is unconstitutional, as a delegation of legislative power to the owner or custodian of stock shipped or in transit.

The act prohibits common carriers from confining stock while in transit in cars, boats, or vessels for a longer period than twenty-eight consecutive hours, without unloading for rest, water, and feed for a period of five hours, except that "upon the written request of the owner or person in custody of that particular shipment," the time of continuous confinement may be extended to thirty-six hours, a penalty being pre-

* Not by the Court.

scribed for each violation of the act. The act springs from the promptings of humanity to guard against the cruel treatment of animals in their handling and care. It has a twofold purpose, however; on the one hand to prevent cruelty in the relation indicated, and on the other to subserve the interests of the owner. Stock in the course of shipment deteriorates in flesh and weight to an appreciable degree, and of course the longer it goes without water, food, and rest the greater the deterioration. This imposes a loss upon the owner, and the greater the deterioration or depreciation the greater the loss. So that, for the protection of the owner, the Congress has said to the transportation companies that they may hold the stock in continuous travel or carriage, without rest or food, for a period of thirty-six hours, with the consent of the owner; otherwise, that they shall not so hold them for more than twenty-eight hours.

It is unusual treatment to confine animals in close quarters at any time, as in the course of transportation, which subjects them to the rocking and swerving of the vehicles in which they are carried. When so confined for any great length of time without rest, food, or water, it needs no elaboration to convince one that the treatment will be attended with cruelty, and the cruelty will increase in severity the longer the treatment is administered. Now we may reasonably assume that Congress considered that the most humane provision for animals in transportation is that they be fed, watered, and rested once in every twenty-eight hours, but that it would not be attended with undue severity if they should be so fed and rested once in thirty-six hours only. But the longer continuous carriage being attended with the greater deterioration in flesh and weight of the animals, and the greater loss to the owner, it has said that the carriage may not be continuous for a longer period than twenty-eight hours unless the owner consents, and then for a period not to exceed thirty-six hours. I say the owner, for the person in custody must be considered to be the agent of the owner. Thus it is that the law simply subserves the two purposes of its enactment—that is, to insure humane treatment of animals while in transportation, and to subserve the interests of the owner or shipper as far as possible in consonance with such treatment.

This exposition of the purposes of the act suffices to dispose of the present controversy. There is, it seems to me, no delegation of legislative power or authority to the owner of the stock shipped. He can not say whether the law shall be effective or not, as he may determine; the law is effective as a humane declaration, whether he acts at all or not; but he may waive a detriment to accrue to himself, if he be so inclined, which is clearly not an action of legislation.

The line of authorities relied upon by counsel for defendant in support of their contention has relation principally to the violation of the rules and regulations prescribed by some executive officer of the Gov-

ernment, the perpetrators being proceeded against criminally; and such rules and regulations have generally been held to be void, because of an attempted delegation of legislative authority. *Morril v. Jones*, 106 U. S., 466; *United States v. One Package of Distilled Spirits*, 88 Fed., 856; *United States v. Maid*, 116 Fed., 650; *United States v. Blasingame*, 116 Fed., 654; *United States v. Matthews*, 146 Fed., 306; *O'Neil et al v. Insurance Co.*, 166 Pa. St., 73.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

UNITED STATES OF AMERICA	}	3145, 3147.
<i>v.</i>		
THE OREGON RAILROAD AND NAVIGATION COMPANY.		

WILLIAM C. BRISTOL, United States Attorney.

W. W. COTTON, A. C. SPENCER, and JAMES G. WILSON for Defendant.

WOLVERTON, *District Judge*.

This case, with another of the same title, was instituted to recover the statutory penalty for carrying stock in continuous transportation for more than twenty-eight hours without rest, water, and feed. A motion has been directed by the defendant against the complaint in each case, for the purpose of determining whether the defendant is liable to a separate penalty for each car carried or for each shipment forwarded. In each case the consignment was of fifty-three head of cattle loaded and transported upon two cars.

Since the cases at bar were submitted, the question involved has been in effect determined by the Circuit Court of Appeals for the Sixth Circuit, in *United States v. Baltimore & O. S. W. R. Co.* (two cases), 159 Fed., 33, where it was held that where several shipments of live stock belonging to different owners are contained on the same train, if the carrier is derelict in observance of the statute, a penalty is recoverable for each shipment, "the shipment, and not the train load, being the integer contemplated as the objective thing to which the offense relates."

If the shipment is the integer in that case, it must necessarily be the integer also as it respects the present causes. That case, therefore, has direct application here, and, being impressed with its soundness, I determine the present controversy upon its authority. The motion will, therefore, be allowed, and but one penalty will be assessed in each case.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 9.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinion of De Haven, J., of the Northern District of California, in Cases Involving Violations of the Act of June 29, 1906 (34 Stat., 607).

SYLLABUS OF THE OPINION.

1. An action of debt to recover a penalty given by statute is a "civil action."
2. An action to recover such penalties was civil and not criminal in character, and hence the Government was only bound to establish its case by a preponderance of the evidence, and not beyond reasonable doubt.
3. Where an interstate carrier has been found guilty of violating the act of Congress of June 29, 1906 (34 Stat., 607), regulating the transportation of live stock, the duty of fixing the amount of the penalty to be recovered by the United States in such action devolves on the court.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT
OF CALIFORNIA.

THE UNITED STATES OF AMERICA, Complainant, v. SOUTHERN PACIFIC COMPANY, Defendant.	}	Opinion rendered March 13, 1908.
--	---	----------------------------------

Nos. 1670-1672, 1674, 1675, 1684, 1687.

DE HAVEN, *District Judge*:

These actions were brought by the United States against the Southern Pacific Company to recover penalties alleged to have been incurred by the defendant under the provisions of act of Congress June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), entitled "An act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia," etc., and were by order of the court consolidated and tried together. The trial resulted in a verdict in favor of the plaintiff in each of the cases, and the defendant has moved for a new trial. (See 157 Fed. Rep. 459.)

1. It is claimed that the court erred in refusing to instruct the jury,

as requested by the defendant, that the Government was required to prove its case beyond a reasonable doubt, and in giving to the jury the following instructions:

You are further charged, gentlemen, that the burden of proof in each one of these cases is upon the Government, and that it is required to prove the acts constituting the violation of the statute by a preponderance of evidence; that is to say, the Government is not required to prove its allegations beyond all reasonable doubt, but simply by a preponderance of evidence, and by a "preponderance of evidence" is meant that evidence which, after a consideration of all the evidence, is in the judgment of the jurors entitled to the greatest weight.

An action of debt to recover a penalty given by a statute is a civil action. (1 Bishop on Criminal Law (3d Ed.) § 32; *Jacob v. United States*, 1 Brock. 520, Fed. Cas. No. 7157; *Stockwell v. United States*, 13 Wall. 531, 20 L. Ed. 491; *United States v. Elliot*, Fed. Cas. No. 15043.) But, independently of the general rule stated in the cases just cited, section 4 of the act of Congress above referred to provides that the penalty prescribed by the statute for a failure to comply with its provisions "shall be recovered by civil action in the name of the United States." The actions, then, being classed as "civil actions," the court did not err in refusing to instruct the jury, as requested by the defendant, that the burden was imposed upon the Government to prove the alleged violations of the statute beyond all reasonable doubt, and in giving the instruction above quoted. (*Lilienthal's Tobacco Co. v. United States*, 97 U. S. 237, 271, 272, 24 L. Ed. 901; *United States v. Brown*, Deady, 566, Fed. Cas. No. 14662; *The Good Templar* (D. C.) 97 Fed. 651; *Roberge v. Burnham*, 124 Mass. 277.)

There are cases in which the contrary has been held, but in my opinion they do not state the true rule. In section 29 of *Greenleaf on Evidence* it is said:

A distinction is to be noted between civil and criminal cases in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict for the Government. In civil cases their duty is to weigh the evidence carefully and to find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt. But in a criminal trial the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is, therefore, a rule of criminal law that the guilt of the accused must be fully proved.

The rule of evidence in relation to the degree of proof required of the Government in the prosecution of persons charged with crime is based upon the tender regard which the law has for the right of the accused to be protected from unjust judgments which may affect his life or liberty; these rights being made secure by the application of the rule that no person shall be adjudged a criminal, and punished as such, except

upon proof which leaves no reasonable doubt of the justice of such a judgment. But in civil actions there is not the same reason for requiring such strict proof of the facts in issue, and therefore the law does not demand it.

The case of *Roberge v. Burnham*, 124 Mass. 277, was an action brought by a parent against the defendant to recover a penalty under a statute containing this provision:

Whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor, or allows a minor to loiter upon the premises where such sales are made, shall forfeit one hundred dollars for each offense, to be recovered by the parent or guardian of such minor in an action of tort.

Upon the trial the defendant asked the court to instruct the jury that they should find for him—

unless upon the evidence they were satisfied beyond a reasonable doubt that the defendant, by himself or his agent or servant, committed the offense of selling liquor to a minor.

The request was refused, and the Supreme Court of Massachusetts, in sustaining the action of the court, said:

The rule of evidence requiring proof beyond a reasonable doubt is generally applicable only in strictly criminal proceedings. It is founded upon the reason that a greater degree of probability should be required as a ground of judgment in criminal cases, which affect life or liberty, than may safely be adopted in cases where civil rights only are ascertained.

And in concluding its opinion the court added:

It is true that this action, like all penal actions, partakes somewhat of the character of punishment; but this does not make it a criminal prosecution. When the legislature gives to the plaintiff a civil action, partly remedial in its nature, it is to be presumed that it is intended that the usual incidents of all civil actions should attach, one of which is that proof by a reasonable preponderance of the evidence is sufficient.

Now it is to be noted that the statute under which these actions are prosecuted does not make a violation of its provisions a criminal offense, and, while it does provide “a penalty in the sum of not less than \$100, nor not more than \$500,” for each failure to comply with its provisions, still Congress was careful to declare that such penalty should be recovered “by civil action in the name of the United States;” and, having thus declared, it must, to use the language of the court in *Roberge v. Burnham*, above quoted, be presumed that it was the intention “that the usual incidents of all civil actions should attach, one of which is that proof by a reasonable preponderance of the evidence is sufficient.”

It is not deemed necessary to discuss objections urged against other instructions given to the jury. It is sufficient to say that in my opinion

the court did not err in the instructions given, nor in its refusal to give other instructions requested by the defendant. The motion for a new trial is denied.

2. The statute provides a penalty of not less than \$100, nor more than \$500, for each violation of its provisions, and when there has been a verdict in favor of the Government the duty of fixing the amount of the penalty by its judgment devolves upon the court.

Upon consideration of all the evidence, the judgment of the court is that in each of the actions above numbered the United States recover from the defendant the sum of \$200 and costs.

O

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 10.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Opinion of Morris, J., of the District of Maryland, in a Case Involving an Alleged Violation of the Act of June 30, 1906 (34 Stat., 768).

SYLLABUS OF THE OPINION.*

1. The act does not require a hearing before the Secretary of Agriculture under sections 4 and 5 before seizure can be effected. The act provides two proceedings to enforce its provisions; one, criminal, *in personam*; the other, *in rem*, by seizure of the offending thing itself.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF
MARYLAND.

UNITED STATES OF AMERICA }
 v. }
FIFTY BARRELS OF WHISKEY. }

MORRIS, *District Judge*:

In this case, which is a libel for the seizure and forfeiture of fifty barrels of distilled spirits alleged to be misbranded contrary to the provisions of the act of Congress of June 30, 1906, the libel does not allege that there had been any preliminary examination such as is provided for by section 4 of the act.

The claimant has excepted to the libel upon the ground that the Court has no jurisdiction unless such a preliminary examination has preceded the seizure.

It is urged that the harshness of the proceeding in seizing goods alleged to be misbranded without giving the owner the opportunity of being heard as to their true nature, is such that the Court should, if possible, construe the law so as to require the examination as a prerequisite to seizure.

Such seizures are not unusual, and it is plain that if the harshness were conceded, it would not justify the court in reading into the law a limitation which it does not contain. The act provides two different proceedings to enforce its provisions. One is by a criminal proceeding *in personam*, the other is by a proceeding *in rem*, by seizure of the

*Not by the court.

offending thing itself, and forfeiture if found to be violative of the law. In this latter case there is no provision for a preliminary examination. Section 10 of the act provides that any article of food, drug, or liquor that is adulterated or misbranded, which is being transported from one State to another, shall be liable to be proceeded against and seized for confiscation by process of libel for condemnation. It is further provided that the proceedings of such libel cases shall conform as near as may be to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case. The libel alleges that fifty barrels of distilled liquor are now at a named place within the District, having been transported from the city of New Orleans, in Louisiana, to Baltimore, Md., branded "Bourbon Whiskey," which brand indicates a liquor containing all the congeneric substances obtained by distillation from a fermented mixture of grain, of which Indian corn forms the chief part, and confined to whiskey distilled in the State of Kentucky, and that the fifty barrels of distilled liquor in question, branded Bourbon Whiskey, are not whiskey at all, but a distillate of molasses. The libel then prays that the fifty barrels of liquor may be proceeded against and seized for condemnation, in accordance with the act of Congress approved June 30, 1906, and prays the court to order process of attachment in due process of law, and that all persons having, or pretending to have, any right, title, or claim in said liquor be cited to appear and answer the premises. This is according to the course of proceeding in libels in admiralty and in similar proceedings *in rem* for forfeitures for violation of the Internal Revenue laws. Such seizures are made in cases in which forfeiture of the goods is the penalty, without preliminary examination or proceedings of any kind, in cases of violation of the customs laws, and the shipping regulations, as well as violations of the Internal Revenue laws.

The exception is overruled.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 11.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Charge to the Jury by Meek, J., of the Northern District of Texas, in Cases Involving Violations of the Act of June 29, 1906 (34 Stat., 607).

SYLLABUS OF THE OPINION.*

1. The Fort Worth Belt Railway Company, transporting live stock from railway terminals at Fort Worth, Tex., to Fort Worth stock yards, is amenable to the Twenty-eight Hour Law.

2. Drunkenness on the part of a defendant railway company's employee, and his consequent failure to perform his duty, does not excuse the company from liability under the statute.

3. The word "knowingly" in the statute means that the railroad company knew that stock had been unloaded for rest, feed, and water within the prescribed time, or had means of knowledge of which it was bound to avail itself.

4. The word "willfully," as used in the statute, means that the defendant railroad company was a free agent, knew what it was doing, and intended to do what it did.

5. Under the statute, the Government must prove its case by a preponderance of the evidence; it need not prove the facts beyond a reasonable doubt.

THE UNITED STATES OF AMERICA
vs.
FORT WORTH BELT RAILWAY COMPANY. }

CHARGE OF THE COURT.

GENTLEMEN OF THE JURY:

In this action the defendant, the Fort Worth Belt Railway Company, is charged with having violated certain provisions of an act passed by Congress regulating and controlling railroads in the handling of interstate shipments of live stock. The act reads in part as follows:

No railroad * * * whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory * * * into or through another State or Territory * * * shall confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written request of the owner or person in custody * * * the time of confinement may be extended to thirty-six hours.

* Not by the court.

The act further provides that any company that knowingly and willfully fails to comply with the provisions of the act with relation to unloading live stock for rest, water, and feeding shall be liable to the payment of a penalty for such knowing and willful failure.

The uncontroverted evidence before you shows that on the 27th day of April, 1907, the Chicago, Rock Island & Pacific Railway Company received for shipment at Foss, Oklahoma, a consignment of hogs to be transported and carried from the point of origin of the shipment in Oklahoma to Fort Worth, Texas, there to be delivered to the National Livestock Commission Company, and that in such transportation the shipment of hogs passed over the lines of the Chicago, Rock Island & Pacific Railway, the Chicago, Rock Island & Gulf Railway, and the Fort Worth Belt Railway. As I have stated to you, this action is against the Fort Worth Belt Railway, which has its line at Fort Worth, Texas, and is engaged in carrying and transporting live stock from the terminals of certain railways at Fort Worth to the Fort Worth stock yards. The evidence is uncontroverted that the shipment in question was received by the Rock Island company at Foss, Oklahoma Territory, and the loading thereof completed at 4 o'clock p. m. on April 27, and that the shipment was delivered to the Gulf company at 5 o'clock p. m., April 28, and that it reached Fort Worth and was turned over to the Fort Worth Belt company at that point on April 29, at 12 o'clock and forty minutes midnight, and that it remained in the possession of the Fort Worth Belt Railway Company loaded in the cars in which it was received until 6.25 a. m. on April 29, at which time the unloading of the shipment was begun.

From this it appears that this shipment of hogs was on the cars en route between Foss, Oklahoma, and its point of destination, to wit, the Fort Worth stock yards, for a period in excess of twenty-eight or thirty-six hours, to wit: Thirty-eight hours and twenty-five minutes. At the time the shipment was delivered to the defendant at Fort Worth it had been on the cars for thirty-two hours and forty minutes; it remained on the cars an additional five hours and twenty-five minutes, notwithstanding the fact that the point of destination of the shipment was, as I understand the evidence, less than a mile distant from the point where the defendant received it.

STOCKYARDS COMPANY AMENABLE TO STATUTE.

The court has admitted in evidence certain testimony bearing upon the organization of the Fort Worth Belt Railway Company for the purposes of its organization and the manner in which it transacts its business; under that evidence I hold that it is amenable and subject to the provisions of the act of Congress under which this suit is being prosecuted.

Evidence was also introduced bearing upon the reason for the delay in the transportation and delivery of this shipment of hogs by the defendant to the consignee—such evidence tending to show that one of the defendant's employees, upon whom was devolved the duty of transporting and hauling this shipment, was drunk and therefore failed to perform his duty.

I now charge you that this evidence constitutes no defense to this action and is withdrawn from your consideration. The law relieves a railway from compliance with the provisions of this act with relation to unloading when it is prevented therefrom by storm, or other accidental causes. I do not consider that the drunkenness and resulting failure to perform his duty on the part of an employee would constitute such an accidental cause as was contemplated by the lawmakers in the use of these words.

DEFINITION OF KNOWINGLY AND WILLFULLY.

Before you can find a verdict of guilty in this case you must believe from the evidence that the defendant knowingly and willfully failed to comply with the provisions of this statute. The word "knowingly" as here used implies that the railroad of whose default the expression is used either knew of the fact that the hogs had not been unloaded for rest, feed, and water within the prescribed time, or had means of knowledge of which it was bound to avail itself and which if followed by diligent inquiry would have brought the fact home to it. The word "willful" as here used implies that the defendant was a free agent and that what it did arose from the spontaneous action of its will, that it knew what it was doing, and intended to do what it did do. It was the duty of the railroad company, holding itself out, as it did, to transport this shipment of live stock from the terminus of the Chicago, Rock Island & Gulf Railway to the Fort Worth stock yards, to know when such shipments were delivered to it for the purpose of such transportation and to use reasonable diligence in ascertaining how long the live stock had been on the cars without unloading for rest, feed, and water. The evidence shows that these hogs had not been unloaded since they were first put on the cars at Foss, Okla. If the defendant company, through its agents and servants, who should have been in charge of this shipment, knew this fact, or by the exercise of reasonable diligence in making inquiry could have ascertained this fact through the means of communication which were at hand for that purpose, then you are charged that they had knowledge of the fact. One is charged with knowledge not only of specific and certain things, but also with knowledge of what he might find out by reasonable diligence in making inquiry; he is charged not only with the knowledge of specific facts that come to his personal observation but with such facts as by reasonable inquiry it is his duty to ascertain,

whether he ascertains them or not, and, therefore, if the defendant company knew, or by the exercise of reasonable diligence in making inquiry could have ascertained, that the hogs had not been unloaded from the time they were first put upon the cars at 4 o'clock p. m. April 27, then it will be held to have had knowledge of the fact, and its failure to comply with the statute, if it did fail, must be held to have been a willful failure, and it will be your duty to find a verdict against the defendant.

BURDEN OF PROOF BY PREPONDERANCE OF THE EVIDENCE.

The burden is on the Government to prove to your reasonable satisfaction, by a preponderance or greater weight of the evidence, the charge that it makes against the defendant. It is not required, however, to prove the facts to your satisfaction beyond a reasonable doubt, and I now charge you that the facts are for your determination and you are the exclusive judges of the credibility of the witnesses and of the weight of the evidence.

If you find a verdict in favor of the United States you will assess a penalty against the defendant of not less than one hundred dollars and not more than five hundred dollars and state the amount of such finding in your verdict.

If you find in favor of the defendant you will simply state in your verdict that you find the defendant "not guilty."

EDWARD R. MEEK, *Judge*.

O

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 12.

GEO. P. McCABE, Solicitor.

THE TWENTY- EIGHT HOUR LAW.

Opinion of Ross, J., for Circuit Court of Appeals, Ninth Circuit, affirming decision of District Court in favor of the Government, in case involving violation of the act of June 29, 1906 (34 Stat., 607).

SYLLABUS OF THE OPINION.

1. Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the twenty-eight hour law, which prohibits interstate carriers of live stock from keeping the same confined for a period longer than twenty-eight consecutive hours without unloading for rest, water, and feeding, and which subjects a carrier knowingly and willfully violating its provisions to a penalty, to be recovered by a civil suit, is not a criminal statute, nor subject to the strict rules of construction or of evidence applied in criminal prosecutions.

2. In an action against a railroad company to recover the penalty for knowingly and willfully violating such act, it is not a defense that such violation was by reason of the "oversight, forgetfulness, and unintentional neglect" of its train dispatchers, contrary to its rules and orders.—164 Fed. 400.

In the Circuit Court of Appeals, Ninth Judicial Circuit.

MONTANA CENTRAL RAILWAY COMPANY }
v. } No. 1,558.
UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

This action was brought by the Government to enforce a penalty growing out of the alleged violation of act of Congress of June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918) to prevent cruelty to animals, commonly known as the "twenty-eight hour law." The plaintiff in error is a Montana corporation, and at the time in question owned and operated a railroad from a point near Great Falls to the city of Butte, in that State. Since the sole defense interposed by the defendant to the action is presented by its answer, a demurrer to which the court below sustained, the only question presented is as to the sufficiency of the answer. The facts set up by that pleading are that on the 23d of November, 1906, Corey Bros., of Montana, delivered to the defendant railway company about 60 horses, at its station of Armington, in that State, to be by it and its connecting carriers transported to Twin Falls in Idaho. The horses constituted part of a train load of live stock consisting of 41 cars. The loading of the train was commenced about 9 o'clock in the morning of the day mentioned; but, although the loading of the train was conducted diligently and without negligence on the part of either the shippers or the carriers, it was not completed, and could not, with due diligence, have been completed, before 8 o'clock of the evening of that day. Because of certain unavoidable delays, the train did not leave Armington until 7.30 a. m. of November 24, at which time it started and was conducted with reasonable diligence and dispatch as far as the defendant company's station of Clancy, in Jefferson County, Mont., arriving at that station at 8 o'clock in the evening of November 24—the horses having then been in the cars of the defendant company for no greater period of time than twenty-four hours since the completion of the loading of the train at Armington. The train, including the cars containing the horses, was not unloaded at Clancy, nor were the horses fed or watered there, and the train did not leave that station until 1 o'clock in the morning of November 25, at which time the horses had

been confined in the cars for a period of twenty-nine hours since the loading of the train had been completed at Armington; nor was the train unloaded at the city of Butte until 10.30 o'clock a. m. of November 25. The answer alleges that long prior to the time when the shipment in question was made the defendant company had duly issued a formal and printed circular known as "Circular No. 1,149," addressed to all its agents, in and by which the agents were notified of the precise provisions, conditions, and requirements of the act of Congress relating to the interstate transportation of animals, and required to conform strictly to all of its provisions; and the company had also, before the time of the shipment in question, issued a special typewritten circular, signed by its superintendent, and known as "Circular No. 21," addressed to all agents, yardmasters, and others concerned, in and by which last-mentioned circular the company again gave notice to each of its employees of the precise requirements of the said act of Congress, and required strict and full compliance with all of its provisions by each of its employees, a copy of both of which circulars the company caused to be placed on all bulletin boards at each of its terminals, for the information, guidance, and instruction of all trainmen and other employees in any way connected with the loading, unloading, or transportation of live stock, or the operation of trains containing such stock. The answer also alleges that the defendant company necessarily intrusted the control and movement of all trains, including the one containing the horses in question, to the supervision and direction of its chief dispatchers and assistant dispatchers at Great Falls, Mont., where its principal office and its division headquarters are located, and alleges that said dispatchers had, long before the time of the shipment in question, been furnished with a printed copy of the said act of Congress, and had been directed in writing to at all times conform to the provisions of that statute, and to so direct and control the movement of live stock trains as to always insure the unloading of live stock for rest, feed, and water in the manner and within the periods prescribed by the said law; that through the oversight, forgetfulness, and unintentional neglect of the said dispatchers, and not otherwise, no notice was given to the company's agent at the station of Clancy that a train containing live stock was being transported over the company's railroad, and no authority or direction was given by any of the said dispatchers for the unloading of the said stock at the said station; that the said live stock was under those circumstances confined on the defendant company's cars for a longer period than twenty-eight hours without being unloaded for rest, water, and feeding, and that the failure to so unload was not prevented by storm or other accidental or unavoidable causes which could not have been anticipated or avoided by the exercise of due diligence and foresight on the part of the defendant company's employees, nor were the said animals carried in cars in which they had or could conveniently have had proper feed, water, and opportunity to rest; that by reason of those conditions and occurrences the present action was instituted by the Government against the defendant company to recover the sum of \$500 as a penalty prescribed by the said act of Congress, and for the costs of such suit.

The act of Congress of June 29, 1906, is entitled "An Act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes," the first, second, third, and fourth sections of which are as follows:

"Section 1. That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia, into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written request of the owner or person in custody of that particu-

lar shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided*, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

"Sec. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals when such detention is of reasonable duration, to enable compliance with section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

"Sec. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided*, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

"Sec. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States in the Circuit or District Court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this Act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means."

I. PARKER VEAZEY, *for plaintiff in error*.

CARL RASCH, *U. S. Attorney*.

Before GILBERT, ROSS, and MORROW, *Circuit Judges*.

ROSS, *Circuit Judge* (after stating the facts as above). From the foregoing statement it will be seen that the answer itself expressly alleges that the horses in question were confined on the company's cars for a longer period than twenty-eight hours without being unloaded for rest, water, or feeding, and that its failure to so unload them was not caused by storm, or other accidental or unavoidable causes, which could not have been anticipated or avoided by the exercise of due diligence and foresight on the part of the company's employees, and that the horses were not carried in cars in which they had, or could conveniently have had, feed, water, or opportunity to rest. The answer further expressly alleges that the cause of this violation of the provisions of the statute was that:

By and through the oversight, forgetfulness, and unintentional neglect of said dispatchers, and not otherwise, no notice was given to the defendant's agent at said station of Clancy that a train containing live stock was being transported over defendant's line, and would arrive at said station, and no authority or direction was given by said dispatchers for the unloading of said stock at said station.

The sole defense is that the statute imposes the penalty only on the carrier "who knowingly and willfully" fails to comply with its provisions; and it is earnestly contended for the plaintiff in error that the company here did not "knowingly and willfully" confine the horses for the time and under the circumstances stated. Its counsel insists that the case, if not a criminal one, is at least of a criminal nature, and that to it should be applied the same strict rules of construction and of evidence which are applied in criminal prosecutions. In that position he is supported by the cases of *United States v. Louisville & N. R. R. Co.* (D. C.), 157 Fed. 979, and *United States v. Illinois Central Railroad Company* (D. C.), 156 Fed. 182. But we are unable to take that view of the matter. We do not understand the statute to make a violation of its provisions a crime. It is true that a penalty is imposed for its violation, but the penalty is a pecuniary one only, which Congress expressly provided shall be recovered by civil action in the name of the United States, having, as we think, the ordinary incidents of a civil action. This view is in accord with that taken of the same and of a similar statute in the cases of *United States v. Southern Pacific Railroad Company* (D. C.), 157 Fed. 459, *United States v. Central of Georgia Railway Company* (D. C.), 157 Fed. 895, *United States v. Philadelphia & Reading Railway Company* (D. C.), 160 Fed. 696, and *United States v. Baltimore & O. S. W. Railroad Company* (C. C. A.), 159 Fed. 33.

The company, being a corporation, could, of course, only act through agents, and its answer expressly alleges that the horses in question were confined on its cars in violation of the statute by reason of the "oversight, forgetfulness, and unintentional neglect" of its train dispatchers. As was held by the court below, we think the facts expressly alleged in the answer negative the claim that the failure to rest, feed, and water the horses was not the result of knowledge and willfulness on the part of the company. It knew through its agents, and through them only could know, that the horses were loaded on its cars, when their transportation commenced, where it should rest, water, and feed them as required by the statute, instead of doing which it, through its agents, continued to carry them in its cars longer than the statutory period of twenty-eight hours without rest, feed, or water. When the company did this, according to its own averments, by and through the only means it transported or could transport them at all, namely, its agents, we do not think it can be heard to say that it did not do so "knowingly and willfully."

The judgment is affirmed.

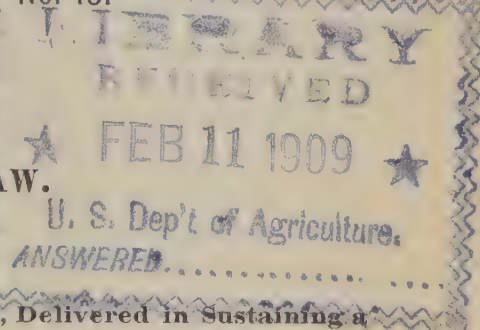
Issued January 20 1909.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 13.

GEO. P. McCABE, Solicitor.

THE CATTLE QUARANTINE LAW.



Opinion of Evans, J., of the Western District of Kentucky, Delivered in Sustaining a
Demurrer to an Indictment Based upon the Act of March 3, 1905,
Commonly Known as the "Cattle Quarantine Law."

SYLLABUS OF THE OPINION.

(Approved by the Court.)

1. In a prosecution founded on the act of Congress of March 3, 1905 (33 Stat., 1264), commonly called the "Cattle Quarantine Law," and the regulations of the Secretary of Agriculture made and promulgated under authority thereof, the indictment must allege facts showing that the rules and regulations of said Secretary have not only been "made" but that they have been "promulgated" in the manner required by section 3 of the act, the mere allegation that they were made and promulgated being insufficient.

2. In a prosecution for transportation of cattle from a quarantined State or portion thereof to another State, in a manner or under conditions other than those prescribed by the rules and regulations made and promulgated by the Secretary of Agriculture under the act of March 3, 1905 (33 Stat., 1264), the indictment need not set out the rules and regulations in *hæc verba*, but facts should be stated upon which the court can base a judgment as to the sufficiency of the allegation therein that the rules and regulations were "duly and legally" made and promulgated, for otherwise it may be that the indictment states only a legal conclusion.

3. Whether the rule that courts will take judicial notice of the contents and provisions of valid executive regulations of a public nature, made under statutory authority, requires them to take judicial notice of the fact that such regulations were duly and lawfully made and promulgated when a particular mode of promulgation is prescribed by the act under which they are made, *quære*.

4. The words "make" and "promulgate" in section 3 of the act of March 3, 1905 (33 Stat., 1264), requiring the Secretary of Agriculture to make and promulgate rules and regulations which shall permit and govern the movement of cattle and other live stock from a quarantined State or portion thereof to another State are not employed tautologically, but have a separate and distinct meaning, and the mere making of the regulations is not sufficient to give them binding force, but in addition they must be promulgated in the manner required by the act.

5. Section 3 of the act of Congress of March 3, 1905 (33 Stat., 1264), requires and authorizes the Secretary of Agriculture to make and promulgate rules and regulations which shall permit and govern the method and manner of the movement of cattle and other live stock from a quarantined State or portion thereof

into another State, and provides that notice of such rules and regulations shall be given in the manner required by section 1 for the notice of establishment of quarantine. The "making" of such rules and regulations is sufficiently accomplished by writing them and signing them officially, and their "promulgation," under this act, is effected by the Secretary of Agriculture notifying the proper officers of railroads doing business in or through the quarantined State of the making of them and publishing notice thereof in such newspapers in the quarantined State as he may select.

6. A count in an indictment against a carrier under the act of March 3, 1905 (33 Stat., 1264), alleging the transportation of cattle from a quarantined portion of a State into another State in cars not placarded and under waybills not stamped, as required by the regulations of the Secretary of Agriculture made under authority therein contained, may be duplicitous, as the failure to placard the cars and to stamp the waybills as required by the regulations are separate and distinct offenses; but it would seem from the treatment of the subject by the Supreme Court that duplicity in an indictment can not be reached by demurrer.

7. *Seemle*. The act of March 3, 1905 (33 Stat., 1264), entitled "An act to enable the Secretary of Agriculture to establish and maintain quarantine districts to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes," is constitutional.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

UNITED STATES	}	Opinion delivered Decem- ber 4, 1908.
<i>vs.</i>		
LOUISVILLE & NASHVILLE RAILROAD CO.		

The indictment charges:

That on the seventh day of September, in the year of our Lord nineteen hundred and seven, in the district aforesaid, and within the jurisdiction of this court, the Louisville and Nashville Railroad Company, a corporation created by and under the laws of the State of Kentucky, and a railroad company, did transport in Louisville and Nashville car number 18771 a great many, to wit, twenty-two cattle, from the town of Lawrenceburg, Lawrence County, in the State of Tennessee, to Louisville, in the State of Kentucky, which said town of Lawrenceburg was then and there situate in a portion of the State of Tennessee which was then and there duly and legally quarantined by the Secretary of Agriculture of the United States for splenetic, southern, or Texas fever in cattle, and said Louisville and Nashville Railroad Company did transport said cattle from said quarantined portion of Tennessee into said City of Louisville, Kentucky, in a manner and under conditions other than those prescribed by said Secretary of Agriculture, and contrary to and in violation of the rules and regulations made and promulgated by said Secretary of Agriculture governing the affixing of placards bearing the words "Southern Cattle" to both sides of all cars carrying interstate shipments of cattle from quarantined areas into areas not quarantined, which said rules and regulations were duly and legally made and promulgated by said Secretary of Agriculture on the twenty-second day of March, 1907, and which became and were effective on and after April 15, 1907, and contrary to and in violation of Rule 1, Revision 2, to

prevent the spread of splenic fever in cattle, made and promulgated by said Secretary of Agriculture on March 30, 1907, and which became effective on and after April 15, 1907.

And the grand jurors aforesaid upon their oaths aforesaid do further present:

That no placard, not less than five and a half by eight inches in size, on which was printed with permanent black ink and in bold-face letters not less than one and a half inches in height, in the words "Southern Cattle," was by the proper officers of said Louisville and Nashville Railroad Company securely or at all affixed or maintained to both or either side of said car carrying said interstate shipment of cattle, and that the waybill of said shipment of cattle did not have the words "Southern Cattle" plainly written or stamped upon its face.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

The accused has demurred thereto upon the ground that the indictment does not sufficiently charge a public offense, and furthermore that it is subject to the objection of duplicity as attempting to charge two separate offenses in a single count. The indictment is based upon the act of March 3, 1905 (33 Stat., 1264), entitled "An act to enable the Secretary of Agriculture to establish and maintain quarantine districts; to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes." Omitting all language not applicable to this case, the act is as follows:

SECTION 1. That the Secretary of Agriculture is authorized and directed to quarantine any State or portion thereof when he shall determine the fact that cattle or other live stock therein are affected by any contagious, infectious, or communicable disease, and he is directed to give notice of the establishment of quarantine to the proper officers of railroad, steamboat, or other transportation companies doing business in or through any quarantined State, and to publish in such newspapers in the quarantined State as he may select, notice of the establishment of quarantine.

SEC. 2. That no railroad company shall receive for transportation or transport from any quarantined State or quarantined portion of any State any cattle or other live stock into any other State except as hereinafter provided.

SEC. 3. That it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed, when the public safety will permit, to make and promulgate rules and regulations which shall permit and govern the method and manner of inspection, delivery, and shipment of cattle and other live stock from a quarantined State or a quarantined portion of a State into any other State, and he shall give notice of such rules and regulations in the manner provided in section 2 (sic., evidently meaning section 1) of the act, for notice of establishment of quarantine.

SEC. 4. That cattle or other live stock may be removed from a quarantined State under and in compliance with the rules and regulations of the Secretary of Agriculture made and promulgated in pursuance of the provisions of section 3 of this act, but it shall be unlawful to move

any cattle or other live stock from any quarantined State or quarantined portion of any State into any other State in manner or method or under conditions other than those prescribed by the Secretary of Agriculture.

SEC. 6. That any person, company, or corporation violating the provisions of sections 2 and 4 of this act shall be guilty of a misdemeanor.

It is contended in support of the demurrer that Congress did not, by the act, constitutionally delegate to the Secretary of Agriculture the power to make rules and regulations, disobedience of which should become a criminal offense. The act authorized the Secretary to determine the particular fact upon the existence of which his power to quarantine a State or a portion of a State depends, to wit, the question whether cattle or other live stock therein are affected with a contagious, infectious, or communicable disease. It also authorizes him to make and promulgate rules and regulations for the inspection and shipment of cattle and other live stock from a quarantined State or quarantined portion of a State into any other State, so as to permit the moving of cattle which are not diseased, and prevent the shipment of such as are. Although it is hard at times to distinguish between the rules applicable to different cases, we see no reason to doubt, notwithstanding the decisions in *United States vs. Eaton*, 144 U. S., 677, and *Morrill vs. Jones*, 106 U. S., 466, that the following authorities upholding similar statutes must control the case, to wit, *Union Bridge Co. vs. United States*, 204 U. S., 364; *Butterfield vs. Stranahan*, 192 U. S., 470; *In re Kollock*, 165 U. S., 526; *Crain vs. United States*, 162 U. S., 625, and *Caha vs. United States*, 152 U. S., 211. However, we do not find it necessary to definitely pass upon the question, because we have concluded that the indictment is insufficient upon other and much narrower grounds.

In *United States vs. Post*, 113 Fed., at page 854, Judge Locke very accurately said:

The well established principle of criminal pleading, which requires direct, positive, and affirmative allegations of every point necessary to be proven; is too well established to require extended consideration. Nothing in a criminal case can be charged by implication, intendment, or recital, but every fact necessary to constitute the crime must be directly and affirmatively alleged.

These propositions are supported by *United States vs. Kess*, 124 U. S., 483; *Ball vs. United States*, 140 U. S., 118; *Evans vs. United States*, 153 U. S., 584; *Batchelor vs. United States*, 156 U. S., 426; *Ledbetter vs. United States*, 170 U. S., 606; *Shaw vs. United States*, Circuit Court of Appeals, sixth circuit, decided November 5, 1908. The obvious reason for this rule is that the accused is entitled to have stated in the indictment fully and precisely all the elements of the offense charged against him in order that he may know what he is to meet by testimony, and whether the facts charged constitute a crime, and if so, that the judgment in the case may afford a bar to any fur-

ther prosecution for the same offense. Applying the general principle to this case, we must hold that the accused is entitled to a statement of the facts showing that the rules and regulations have not only been "made," but that they have been "promulgated" in the manner required by the act, for if not so made and promulgated the defendant was not bound by them, and disobedience to them before they were legally promulgated could not be a criminal offense. The indictment manifestly is not based upon the mere fact that cattle were transported from the quarantined district in the State of Tennessee into the State of Kentucky, but upon the fact, plus the other facts, that this was done without putting upon each side of the car used in the transaction the necessary placard containing the words "Southern Cattle" in letters of the size prescribed by the regulations, and without stamping or writing in plain letters the same words on the face of the waybill. The offenses really charged are violations of the rules and regulations which the indictment avers were "duly and legally" made and promulgated by the Secretary of Agriculture on March 22, 1907. While the regulations need not be set out in *hæc verba* in the indictment, facts should be stated upon which a judgment of the court may be based as to the sufficiency of the allegation that they were "duly and legally" made and promulgated, for it may be that in this connection the indictment states only a legal conclusion. True, if the regulations were duly and legally made and promulgated, the court would take judicial notice of their contents and provisions. (*Caha vs. United States*, 152 U. S., 221-2 and cases cited.) But does that rule require the courts to take judicial notice that the rules and regulations were duly and legally made and promulgated, when, as here, a particular mode at least of "promulgating" them is prescribed by the act? As the word "make" and the word "promulgate" are both used in the act, we must infer that they were not tautologically employed, but that each was intended to have a separate and distinct meaning in order to give effect to the purpose of Congress. Merely to "make" the rules and regulations is not sufficient under the act. To put them effectively in force, they must also be "promulgated," in this respect differing from an act of Congress which becomes effective when it is enacted, whether promulgated or not, promulgation not being a condition precedent to the taking effect of legislation. To "make" rules and regulations would appear to be sufficiently accomplished by writing them and signing them officially, but to "promulgate" them under this act would seem to require something more, and we think that what that something more is is clearly indicated by the provisions of section 3, which requires that the Secretary of Agriculture shall "give notice of such rules and regulations in the manner provided in section 1" (as we have construed it) "for notice of establishment of quarantine," namely, by notifying "the proper officers of railroads doing business in or

through any quarantined State, and by publishing such rules and regulations in such newspapers in the quarantined State as he may select." This notice and this publication would, we think, be a "promulgation" of the rules and regulations, and we think they can not under the act become effective so as to be the basis of criminal prosecutions until they are thus publicly made known—that is to say, "promulgated." We think that a party criminally charged with disregarding or violating the rules and regulations which the act empowers the Secretary of Agriculture to make is entitled to have the indictment aver the facts constituting such promulgation before he can be called upon to plead it. To entitle the Government to show the facts at the trial, as indubitably it must if a plea of not guilty is entered, the indictment must contain express allegations in respect thereto, or otherwise a basis for their admissibility as testimony will be lacking, inasmuch as allegation and proof must correspond as well in criminal as in civil proceedings.

The requirements of the act as to the promulgation of any rules and regulations made under its provisions are so express and explicit that promulgation by the proper executive officer is an essential prerequisite to their being put in force against the people as parts of the laws of the country, any violation of which may be punished as a crime. The idea has not become obsolete that the laws, whether strictly statutory enactments or binding rules and regulations by which we are to be governed, must not be written so high upon the walls or otherwise so secretly made that those bound to obey them can not ascertain what they are. Congress, therefore, must have had a just and wise object in view in requiring "promulgation" (that is to say, publication in the way it prescribed) of rules and regulations in the premises. While railroad companies are bound to take notice of the act of Congress itself, they are not chargeable with notice of the rules and regulations thereby authorized nor is obedience to them obligatory or possible until they are in fact "made" and in fact "promulgated" in the manner required by law. Congress intended that the persons affected should have an opportunity to know of the rules and regulations, and promulgation was required for that purpose.

It is elementary that criminal and penal statutes must be construed with reasonable strictness. No rule is better established. Logically, and we think necessarily, upon equally strong reasons a similar rule should be applied to the interpretation and to the manner of exercising authority given to executive officers under legislation like that now before us, so far at least as such officers are given power to increase the list of crimes and penal offenses. Their acts under such legislation, whereby certain things not previously so are made criminal or penal, have a sort of quasi legislative flavor, and we have concluded that any addition by the executive department of the Government to the catalogue of things which constitute criminal offenses should derive its

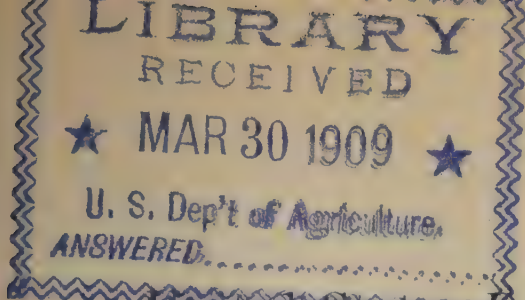
vitality and force from a strict and exact compliance with the authority given by the legislative department for making such addition. Otherwise new crimes might be created by mere executive action alone, and not at all by legislation.

It results that we must hold that the indictment is faulty, because it does not aver in detail the facts showing a legal promulgation of the rules and regulations alleged to have been made by the Secretary of Agriculture.

It is also insisted that the indictment is bad for duplicity in that it charges two offenses, to wit, first, that placards containing the words "Southern Cattle" were not placed on each side of the car during the transportation; and, second, that the waybill did not have these words plainly written or stamped on its face. It would seem to be obvious that these omissions were separate and distinct violations of the regulations which require each of those things to be separately done; but while the general rule that duplicity vitiates an indictment is recognized by the lower courts, we have not found that the rule has received much favor, if any, in the Supreme Court. The way that court treats the objection is illustrated by *Connors vs. United States*, 158 U. S., 408; *In re Lane*, 135 U. S., 443; *Crain vs. United States*, 162 U. S., 625; and *Wiborg vs. United States*, 163 U. S., 632. These cases seem to indicate the view of the Supreme Court to be that the fault of duplicity should be reached by a motion to elect, or in some of the other ways suggested by those opinions rather than by a demurrer.

In view of these considerations, and because of the technical strictness usually required in such matters by the rulings of the Circuit Court of Appeals of this circuit, we conclude that the demurrer must be and it is sustained. The indictment will be quashed, and the matter again submitted to the grand jury if the district attorney shall so desire.

WALTER EVANS, *Judge*.



Issued March 25, 1909.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 14.

GEO. P. McCABE, Solicitor.

TWENTY-EIGHT HOUR LAW.

Opinion of the Circuit Court of Appeals for the Eighth Circuit on appeal by the United States from a judgment of the U. S. Circuit Court for the District of Wyoming overruling the demurrer to the answer of defendant in a case involving a violation of the act of June 29, 1906 (34 Stats. 607), commonly known as "The Twenty-eight Hour Law."

SYLLABUS OF THE OPINION.

(Approved by the Court.)

1. The act of June 29, 1906 (34 Stat., 607), sec. 1, provides that no railroad engaged in interstate commerce in the transportation of cattle, sheep, swine, or other animals shall, without the written request of the owner or person in custody thereof, "confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight," and section 3 provides "That any railroad * * * who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: * * *." *Held*, That section 1 creates a duty to be performed by carriers and that section 3 imposes a penalty, not for failure to perform the duty, but only when the carrier "knowingly and willfully" fails in that regard, and in an action to recover the penalty, the defendant by not denying the averment of the petition in that regard, admitted that it "knowingly" failed to unload the stock.

2. A general averment in a pleading is always controlled and limited by specific allegations on the same subject matter.

3. The word "willfully" as employed in section 3 of the act of June 29, 1906, not being so employed in connection with a crime or offense *malum in se*, but with an offense purely statutory subjecting the offender to a civil action only, does not imply malice or evil motive, but only the *intentional* doing of the act forbidden.

4. To construe the word "willfully" as used in section 3 of the act of June 29, 1906, as importing an evil purpose or bad motive would thwart the obvious purpose of the act.

5. The real purpose of the act of June 29, 1906, commonly known as the "Twenty-eight Hour Law," was to alleviate the condition of dumb animals in transit.

6. The act of June 29, 1906, is a condemnation of indifferent rather than malevolent conduct on the part of carriers of live stock.

7. Great and unusual press of business does not, unexplained and of itself, constitute an accidental and unavoidable cause which could not be anticipated and avoided by the exercise of due diligence and foresight, within the meaning of section 1 of the act of June 29, 1906, and does not excuse confinement by a carrier of live stock beyond the time therein limited, and the answer of a railroad company which avers that its failure to unload the stock within the time required by the act was wholly caused by the great and unusual press of business both on its tracks and at its stock yards, causing delays at the meeting points of its trains and failures of its engines, is an admission that the alleged offense was willfully committed within the meaning of section 3 of the act.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT. No. 2873.—
DECEMBER TERM, A. D. 1908.

UNITED STATES OF AMERICA, <i>Plaintiff in Error.</i> <i>vs.</i> UNION PACIFIC RAILROAD COMPANY, A CORPORATION, <i>Defendant in Error.</i>	}	In Error to the Circuit Court of the United States for the District of Wyoming.
--	---	---

Mr. Timothy F. Burke (Mr. George P. McCabe and Mr. Edward T. Clark were with him on the brief) for plaintiff in error.
 Mr. John W. Lacey for defendant in error.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge, delivered the opinion of the court.

This was an action at law instituted by the United States to recover a penalty from the defendant railroad company, a carrier of interstate commerce, for alleged violation of the act of Congress approved June 29, 1906 (34 Stat. 607), which prohibits confinement of live stock in cars for more than twenty-eight hours without unloading for rest, water and feeding. The petition stated facts constituting a cause of action under the statute and particularly stated that the railroad company confined the live stock "knowingly and wilfully." The answer contained an admission that defendant received the stock for carriage, that it was confined en route and not unloaded for a period of more than thirty-six hours. It then averred as follows: "And defendant denies that its failure to unload the said live stock in accordance with law was in any way *wilful* or from avoidable cause which could have been anticipated by the exercise of due diligence and foresight; but on the contrary avers that the said failure was *wholly* caused by the great and unusual press of business both on the tracks of the defendant and at its stock yards, causing delays at the meeting points of its trains,

and failures of its engines, both those carrying the cars aforesaid and those drawing other trains which affected and delayed the train carrying the said live stock and *alone* caused the said live stock to be confined beyond the time limited by law."

The sufficiency of this answer as a defense was challenged by demurrer, which was overruled, and plaintiff declining to plead further, final judgment was rendered in favor of the defendant. Due exception having been preserved, the case is brought here by writ of error for review.

Did the answer state a defense?

Sec. 1 of the act of June 29, 1906, provides that no railroad engaged in interstate commerce in the transportation of cattle, sheep, swine or other animals shall, without the written request of the owner or person in custody thereof, "confine the same in cars" * * * "for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight."

The provisions of sec. 2 are immaterial for our present inquiry.

Sec. 3 provides:

"That any railroad" engaged in interstate commerce * * * "who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars."

Sec. 4 provides:

"That the penalty created by the preceding section shall be recovered by civil action" * * *.

From the foregoing it appears that sec. 1 creates a duty to be performed by carriers and that sec. 3 imposes a penalty not for the failure to perform the duty but only when the carrier "knowingly and wilfully" fails in that regard. The defendant by not denying the averment of the petition in that regard admitted that it "knowingly" failed to unload the stock.

It is contended that the answer puts in issue the allegation of the petition that defendant's failure to unload the stock was wilful and the allegation that defendant was not prevented from unloading the stock by an unavoidable cause which could not have been anticipated by diligence and foresight; and that as a result of these denials of material averments an issue of fact was joined which necessitated the overruling of the demurrer.

The answer after admitting that the stock was not unloaded and denying that the company's failure to unload was wilful or from avoid-

able cause, proceeded in an unbroken sentence to declare as follows: "But on the contrary avers that the said failure was *wholly* caused by the great and unusual press of business" * * * "which *alone* caused the said live stock to be confined beyond the time limited by law."

It is a familiar principle of pleading and one repeatedly recognized by this court that a general averment is always controlled and limited by specific allegations on the same subject matter. *Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 650, 659; *Hayes-Young Tie Plate Co. v. St. Louis Transit Co.*, 70 C. C. A. 1, 137 Fed. 80.

Applying this rule the conclusion follows that the denial of wilfulness or avoidable cause must be treated as limited or explained by the words which immediately follow it and that the pleading taken as a whole means that by reason of the alleged great and unusual press of business which "wholly" and "alone" caused the failure to unload the cattle and for that reason only there was no wilfulness, but there was an unavoidable cause.

Does the fact that the defendant, as a sole result of a great and unusual press of business which occasioned delays at its meeting points and inability of its engines to do the work, knowingly confine live stock committed to it for transportation, more than twenty-eight hours without unloading it, amount to a denial of the allegation of wilfulness?

Counsel for defendant contend that the word "wilfully" as employed by the statute necessarily implies an evil purpose or bad motive and have in their brief collected and reviewed many cases dealing with the meaning of this word. We find no occasion, however, to follow them through this maze of authority. The word is here employed in connection, not with a crime or offense *malum in se*, but with an offense purely statutory subjecting the offender to a civil action only. In view of our former rulings on this question we are of opinion and so hold that as here employed the word means only the intentional doing of an act forbidden by the statute.

We held in *Armour Packing Co. v. United States*, 82 C. C. A. 135, 153 Fed. 1, that "a simple purpose to do the act forbidden, in violation of the statute, is the only criminal intent requisite to a conviction of a statutory offense which is not *malum in se*." The Supreme Court (209 U. S. 56), reviewing the same case, said: "While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude to make out a crime, there is a class of cases within which we think the one under consideration falls, *where purposely doing a thing prohibited by statute* may amount to an offense, although the act does not involve turpitude or moral wrong."

We approved and applied this definition in the case of *Chicago, St. P., M. & O. Ry. Co. v. United States*, C. C. A.,, 162

Fed. 835, and discover no reason for departing from it in this case. To hold that some evil purpose or bad motive must be shown in order to constitute a cause of action under sec. 3 of the act of June 29, 1906, would in our opinion, thwart the obvious purpose of the legislation. It can hardly be conceived that any reputable carrier would deliberately and designedly because of ill will or other malevolent feeling towards the dumb animals or their owners, fail to conform to the reasonable and humane requirement of the law. If the law be operative only to restrain the possible exercise of such evil and perverse disposition it would have little if any scope of operation.

The real purpose of the legislation, in our opinion, was to alleviate the condition of dumb animals in transit.

The desire to curtail expense and promote economy of operation naturally encourages indifference to if not a disregard of every impediment to quick and cheap transportation. The act of June 29th, we think, was aimed at this natural propensity and is a condemnation of indifferent more than malevolent conduct. So far as the dumb animals are concerned the effect is the same in either case. They would suffer just as much if deprived of rest, water, and food by indifference of the carrier as they would by his malevolence.

The meaning we ascribe to the word "wilfully" gives a reasonable scope of operation to the act while the meaning contended for by defendant's counsel practically nullifies it.

The answer admits that the defendant knowingly, that is, intentionally, kept the live stock confined in cars without unloading for more than twenty-eight hours and did this merely because of a great and unusual press of business as there stated. This in our opinion is an admission that it was wilfully done within the true meaning of the statute. Otherwise we must concede, which we can not do, that a mere press of business justifies a disregard of the law.

Did the great and unusual press of business as described in the answer amount as a matter of law to "an accidental or unavoidable cause which could not be anticipated or avoided by the exercise of due diligence and foresight," within the true meaning of sec. 1 of the act in question? We think not. It might constitute, when taken in connection with other facts and circumstances attending a transportation of live stock, some evidence of such a cause, but in itself it can not, in our opinion, constitute that cause. If it could a transportation company would have it in its power to create, *ad libitum*, a cause which would justify its disobedience of the law.

The pleadings do not raise the question whether a press of business may not in some circumstances not reasonably to have been anticipated be so great and unusual as to justify continuous confinement of live stock beyond twenty-eight hours. We therefore refrain from expressing any opinion on that subject. All we are called upon to decide and

all we do decide is that a great and unusual press of business does not, unexplained and of itself, excuse confinement of live stock beyond the time limited by law.

It results that the facts as pleaded in the answer constitute no defense and that the Circuit Court erred in overruling the demurrer. The judgment is therefore reversed with directions to sustain the demurrer.

Filed February 15, 1909.

O

United States Department of Agriculture,
OFFICE OF THE SOLICITOR.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinion of the Circuit Court of Appeals for the First Circuit, in Cases Involving Violations of the Act of Congress of June 29, 1906 (34 Stat. 607), Commonly Known as "The Twenty-eight Hour Law."

SYLLABUS.

1. CARRIERS—INTERSTATE CARRIERS OF LIVE STOCK—STATUTORY REGULATIONS—ACTION FOR PENALTIES.

A declaration, in an action by the United States to recover the penalty for violation of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) by permitting live stock to remain in a car for a period longer than 28 hours without unloading for rest, water, and feeding, which describes the defendant railroad company as "lessee" of the road and otherwise follows the language of the statute, is sufficient after verdict, although it does not expressly allege that defendant was at the time operating the road.

2. CARRIERS—INTERSTATE CARRIERS OF LIVE STOCK—STATUTORY REGULATIONS—ACTION FOR PENALTIES.

Technical objections to the declaration, in an action by the United States against a railroad company to recover the penalty for violation of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), considered, and *held* without merit after verdict.

3. CARRIERS—INTERSTATE CARRIERS OF LIVE STOCK—STATUTORY REGULATIONS—ACTION FOR PENALTIES.

So far as relates to the rules of pleading and proof, an action by the United States to recover the penalty for violation of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) is a civil and not a criminal action.

4. CARRIERS—INTERSTATE CARRIERS OF LIVE STOCK—STATUTORY REGULATIONS—ACTION FOR PENALTIES—PLEADING.

In an action by the United States against a railroad company to recover the penalty for violation of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), which requires a carrier to unload live stock for rest, water, and feeding, as therein provided, "unless prevented by storm or by other accidental or unavoidable causes, which can not be anticipated or avoided by the exercise of due diligence and foresight," the plaintiff is not required to allege or prove the nonexistence of accidental or unavoidable causes which might have prevented a compliance with such requirement; but such causes are matters of defense.

5. CARRIERS—INTERSTATE CARRIERS OF LIVE STOCK—STATUTORY REGULATIONS—VIOLATION.

In the provision of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) subjecting railroads to a penalty for knowingly and willfully failing to obey such act, the words “knowingly and willfully” do not require an evil intent, but only that defendant should have failed to obey the statute purposely and with knowledge of the facts.

6. EVIDENCE—BURDEN OF PROOF—PENAL ACTION.

The rules as to the burden of proof with reference to allegations setting up the negative in penal suits, so far as applicable to this case, explained and applied.

7. EVIDENCE—DOCUMENTS—ADMISSIBILITY—MANNER OF PROCUREMENT.

As a general rule papers which are in fact in court may be used in evidence, even though the party offering them procured them illegally; so that papers produced by counsel for one party pursuant to an irregular order of the court, made at the instance of the adverse party, may be introduced in evidence by the latter.

8. CARRIERS—INTERSTATE CARRIERS OF LIVE STOCK—STATUTORY REGULATIONS—PENALTY FOR VIOLATION.

Where a railroad train carried a number of different consignments of live stock, and the company failed to unload any of them for rest, water, and feeding, as required by the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), it became subject to a penalty thereunder for each consignment.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE FIRST CIRCUIT.

NEW YORK CENTRAL AND HUDSON RIVER	} No. 774.
RAILROAD COMPANY	
v.	
UNITED STATES OF AMERICA	

In Error to the District Court of the United States for the District of Massachusetts.

George L. Mayberry (George P. Furber, on the brief), for plaintiff in error.

Asa P. French, U. S. Atty., and William H. Garland, Asst. U. S. Atty. Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This was an action of contract commenced in the district of Massachusetts, and, therefore, governed by the Massachusetts practice, which makes it equivalent to an action of debt for a statutory penalty. The verdict was for the United States, whereupon the respondent took out this writ of error. The suit was based on Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), of which the essential sections are the first, second, and third, as follows:

“Section 1. That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other

animals shall be conveyed from one State or Territory or the District of Columbia, into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: Provided, that it shall not be required that sheep be unloaded in the nighttime, but when the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

“Sec. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

“Sec. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: Provided, that when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.”

There are several counts in the declaration, of which we need quote only one, as follows:

“And the plaintiff says that the defendant is a railway corporation duly established and existing under the laws of the State of New York, and at the times hereinafter mentioned was the lessee of the Boston & Albany Railroad Company, a railway corporation and common carrier engaged in the transportation

of cattle from one State to another in the United States; that is to say, from Albany, in the State of New York, to Boston, in the commonwealth of Massachusetts.

“And the plaintiff says that the defendant on the twenty-seventh day of January, A. D. 1907, at Albany in the State of New York, did load upon one of its cars, known as ‘N. Y. C. Car, No. 23316,’ certain cattle, to wit, twenty-two cows and forty-nine calves, consigned by George N. Smith, of said Albany, to the order of the said Smith, at said Boston; that said car was fully loaded with said cattle at three o’clock in the afternoon of said day, and said car containing said cattle was conveyed by the defendant from said Albany over the line of said Boston & Albany Railroad Company to said Boston, where it arrived on the twenty-ninth day of said January at nine o’clock and thirty minutes in the forenoon; that during the period of time in which said cattle were in transit as aforesaid, and for a period of more than twenty-eight consecutive hours—that is to say, for a period of forty-two hours and thirty minutes—the defendant did knowingly and willfully fail to unload said cattle from said car for rest, water, or feeding, and did knowingly and willfully fail and neglect to feed or water said cattle.

“And the plaintiff says that the defendant was not prevented by storm, or by other accidental or unavoidable cause which could not be anticipated or avoided by the exercise of due diligence or foresight, from unloading said cattle from said car, or from feeding or watering said cattle as required by law; that said car was not one in which said cattle had proper food, water, space, or opportunity to rest; and that no written request was then or theretofore made by the owner, or any person in custody of said shipment of cattle, that the time of confinement of said cattle might be extended from twenty-eight hours to thirty-six hours.

“Wherefore, and by reason of the premises, the plaintiff says that the defendant became liable to pay to the plaintiff the penal sum of five hundred dollars, in accordance with the provisions of the statutes of the United States in such cases made and provided, and plaintiff prays judgment for said sum and for its costs.”

Several questions of pleading were raised by the defendant below now the plaintiff in error. The first attempt to raise them was by a motion to dismiss. This was overruled; and, as it was an inartificial method of pleading, the court might in its discretion strike it out or overrule it, so that its action laid no basis for a writ of error. Even under the Massachusetts practice acts the demurrer is retained, with the requisition that the causes of the demurrer be specifically assigned, and that no mere defects of form may be so assigned. Rev. Laws, c. 173, §§ 13, 14.

Subsequent to the verdict a motion in arrest of judgment was filed, specifying all the topics which we will consider, and perhaps some others. As we understand, this is not known in the Massachusetts practice in civil cases; but this is not of any consequence, because, whatever might, under the common-law practice, be thus assigned, would be good on a writ of error. It must be remembered, however, that a verdict cures many defects at common law and under the statutes of jeofails. Independently of what is found at common law and

under the statutes of jeofails, section 954 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 696) provides:

“No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof.”

Consequently, as there was no demurrer, no mere matter of form can be taken advantage of at the present stage of the litigation.

The statute on which the suit was based is quite inartificially drawn. In the first section it enumerates the “lessee.” The natural and just presumption would be that the statute is aimed at the corporation actively operating the road over which the transportation occurs, whether it is the lessee or not; but it is plain that it assumes that the lessee would necessarily be such active operator. The first objection to the declaration rests on the fact that it does not discriminate clearly in reference to this particular; but it follows the language of the statute, and certainly, after verdict, must be held to be sufficient.

Then, again, the statute uses the words “confine the same,” which are not precisely found in this declaration. Nevertheless these words do not relate to the real pith of the offense, which is found in what follows, namely: “Without unloading the same in a humane manner, and into properly equipped pens for rest, water, and feeding.” Force is not to be attached to these words to such an extent as to hold that they mean anything more than ordinary transportation of cattle in the ordinary railroad cars used for that purpose. While the declaration omits the word “confine,” it expressly states that the cattle were loaded in such cars, and that they were “fully loaded with such cattle,” and were “conveyed by the defendant” from Albany to Boston “over the line of” the corporation described as the lessee. As it was not required that the pleader should anticipate the proviso in the third section of the act, this clearly describes all the confinement to which the statute relates; and, as this substitution for a particular word named in the statute of other words having the same effect is not a lawful ground of objection, especially after verdict, the requirements of the law in this particular are fully complied with.

The defendant below also objects because the declaration alleges that it failed to unload the cattle “for rest, water, or feeding,” and it claims that, if the cattle were unloaded for any purpose, that would be sufficient; but the statute in this particular is express, and the allegations of the declaration conform strictly to it. Some comment is also made upon the expression in the first count, as follows: “Did knowingly and willfully fail and neglect to feed or water said cattle.” It is said this is

an offense only under the second section of the statute, which is true. It is also true that there is not sufficient in these words to properly describe an offense under that section. As the count properly declared an offense under the first section, they might have been stricken out as surplusage; but, as no motion therefor was made, they became immaterial matter.

The result is that, so far as any questions of pleading are urged on us, they need not be considered further than they have been.

The statute enumerates some matters which might excuse the defendant if they had been proven. A portion of them—that is, so much as relates to storms and other accidental or unavoidable causes—is incorporated into the first sentence of the first section, and is therefore necessary to be alleged. Others are incorporated into a proviso which forms a clearly separate topic, as much as though they appeared in a distinct section. Therefore it was not necessary for the United States to negative them. All these propositions are covered by Chitty on Pleading, *246, *247. The plaintiffs offered evidence from the records of the Weather Bureau that there was no storm. They offered no proof, however, bearing on the “other accidental or unavoidable causes,” named in the statute.

Penal actions are for some purposes criminal in their nature, so that they are subject to certain provisions of the Constitution of the United States with reference to constitutional guaranties; yet, so far as the ordinary rules of pleading and proof are concerned, a suit like this is to be regarded as merely a civil proceeding. This was understood to be the law even before the ruling of Lord Kenyon in *Wilson v. Rastall* (1792) 4 D. & E. 753, 758. This was in a *qui tam* suit. There had been a verdict for the defendant. Thereupon the plaintiff moved for a new trial. Of course, if the case was a criminal one strictly, there could be no new trial, under the English practice or under the Constitution of the United States. Lord Kenyon said:

“All cases of indictments I lay out of the case, because they are criminal cases, and are exceptions to the general rule; but I consider this as a civil action.”

The rule of this case is stated in Dane’s Abridgement, vol. 5, p. 243, which is sufficient authority for the law in the United States at the beginning of the last century. The same rule was stated in *Watertown v. Draper*, 4 Pick. (Mass.) 165. The origin of this ruling will be found in the earlier case of *Atcheson v. Everitt*, Cowper, 382, 387, decided in 1776. There the question came directly in issue. At page 383, Lord Mansfield thought that, under the law as it then stood, where an action and an indictment both lie for the same act, “a Quaker is an admissible witness in the action, although not on the indictment.” The then statute, as he said, made “an exception to their being admitted as witnesses in criminal causes.” He said that till that time it had not

been decided whether they were admissible in actions for penalties; that is to say, whether actions for penalties were "criminal causes" or not. He observed:

"There being no case in point, it is a material circumstance that actions for penalties are to a variety of purposes considered as civil suits. They may be amended at common law. To be sure, the action in this case is not only given to recover a penalty; but it is attended likewise with disabilities. Therefore it partakes much of the nature of a criminal cause. Moreover, the offense itself is not merely *malum prohibitum* by statute, but it was indictable at common law."

Then, referring to the question of admissibility of the oaths of Quakers, he concluded:

"But how the law is in respect to this particular case I am at present not at all decided in my opinion."

The point came up again on reargument, as appears by Lord Mansfield's opinion, commencing on page 388. On page 391 he concluded that the proceeding was not a criminal one, but "as much a civil action as an action for money had and received."

This case was on a motion for a new trial in the King's Bench, and, as is plain, it was very carefully considered, and the judgment was concurred in by all the judges. Therefore, in view of *Atcheson v. Everitt* and the other authorities cited, we must agree that, both in the United States, subject to the limitations we have stated, and in England, the present proceeding is held to be "as much a civil action as an action for money had and received," using the language of Lord Mansfield. While, as we have said, certain guaranties of the Constitution apply, none of them touch any of the questions involved which are raised by the plaintiff in error; and the rules of pleading and procedure and evidence for this suit are those which apply to an ordinary civil action for debt between private parties.

In order that we may not be misunderstood, we reiterate that certain limitations arise from the application of constitutional guaranties and other peculiarities. We do not presume that in all particulars article 3 of the Constitution, or the amendments (article 5 and article 6), are to be disregarded, even with reference to actions of debt. This is illustrated by *Lees v. United States*, 150 U. S. 476, 480, 14 Sup. Ct. 163, 37 L. Ed. 1150. We do not presume that Congress, even by providing a civil action, could avoid a grand jury for infamous offenses, or could violate the guaranty against self-impeachment. So, also, civil suits for penalties must be prosecuted in the court of sovereignty imposing the penalty, as decided in *Wisconsin v. Pelican Insurance Company*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, although held otherwise in Massachusetts; and, until procedure has ripened, even *qui tam* actions are within the pardoning jurisdiction of the executive. *Huntington v. Attrill*, 146 U. S. 657, 673, 13 Sup. Ct. 224, 36 L. Ed. 1123. Notwith-

standing such exceptional distinctions and limitations, the conclusions of the Supreme Court, and its reasonings leading thereto, in *United States v. Zucker*, 161 U. S. 475, 480, 481, 16 Sup. Ct. 641, 40 L. Ed. 777, where it was held that depositions might be used in penal suits, and in *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223, and *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, permit the application here of the general rules of practice, procedure and evidence.

Under these circumstances it follows that the United States were bound to support their case before us by only a preponderance of the evidence; but a question arises whether the burden primarily rested on them as to those portions of section 1 of the statute in question which precede the word "provided." They offered evidence about prevention by storm, sufficient according to the authorities to sustain themselves so far as that is concerned; and, perhaps, so far as that is concerned, they were bound to offer some evidence, because that was a matter of general information as to which they could do this without difficulty.

Regarding, however, the question of "other accidental or unavoidable causes," we are of the opinion that the burden rested primarily on the defendant. In his work on *Criminal Evidence* (9th Ed., § 319 et seq.), Mr. Wharton admits that the weight of the authorities is in favor of the rule, not only in civil cases, but at least to a certain extent in criminal cases, that a negative proposition, although required to be pleaded, must generally be first met by proof from the defendant. This is so stated in *Greenleaf's Evidence*, § 74. Of course, it is otherwise where the negative allegation is a fundamental part of the offense in a criminal case of the claim in a civil suit. This is shown by Mr. Greenleaf in section 78, and is illustrated in suits for malicious prosecution, and in some cases of suits for statutory penalties, instances of which are given by Mr. Greenleaf. On this topic, however, we need not go farther than *Colorado Coal Company v. United States*, 123 U. S. 307, 318, 319, 8 Sup. Ct. 131, 31 L. Ed. 182, which fully sustains our propositions. Of course the rule *ab inconvenienti* has application to a very considerable extent. Here, as to the matter of "accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight," the rule of inconvenience applies in favor of the United States, because such causes might easily have been shown by the defendant below, while the method in which transportation by railroad corporations is done over long distances is such that it is quite impossible for those who do not accompany trains to prove what the particular circumstances are.

What we have said, if we are correct, determines also against the plaintiff in error its claim that the United States were bound to establish their propositions beyond a reasonable doubt. The only thing

we have found that may be considered to question this are certain expressions in *Chaffee & Company v. United States*, 18 Wall. 516, 544, 545, 546, 21 L. Ed. 908; but, wherever that opinion uses the expression "reasonable doubt," it will appear on a careful examination that it originated in the Circuit Court, and was never affirmed by the Supreme Court as suitable. All the Supreme Court decided was in reference to the obligation of the defendants in the litigation there to meet a *prima facie* case; and the opinion therefore observed, very justly and wisely, that the rule of the Circuit Court justified the criticism "that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction." It is true that here the Supreme Court, as it has done everywhere, recognized the fact that the suit in that case, though civil in form, was so far criminal that the constitutional guaranty against self-crimination remained, as we have already pointed out is the fact. On the other hand, the rule of the preponderance of the evidence in *qui tam* actions was applied in *Roberge v. Burnham*, 124 Mass. 277, on careful consideration. This was a *qui tam* action, and, under the decisions of the Supreme Court, is of some authority in the federal courts in the district of Massachusetts.

We may also, in this connection, dispose of some suggestions made by the plaintiff in error, not thoroughly explained to us, to the effect that on some parts of the case testimony was lacking. In view of the facts we have stated, no testimony required to make out the case on every point, even beyond a reasonable doubt, was lacking, unless it be as to the matter of storms, which is a negation; so that the United States, as we have said, offered all the proofs required, either in criminal or civil proceedings, to make out a sufficient case until met by some contradictory matter.

The authorities relied on by the plaintiff in error to contravene any of our propositions with regard to either pleadings or the rules of evidence are to some extent not of sufficient weight to bind us, and to some extent do not apply to the conditions of this case, and for the rest they sustain what we have said, rather than contradict it. For example, *Commonwealth v. Thurlow*, 24 Pick. (Mass.) 374, 380, 381, in an opinion by Chief Justice Shaw, fully recognizes the distinction between the proof of affirmative allegations and the proof of negative allegations, and the force of the rule *ab inconvenienti* even as applied to criminal proceedings.

As bearing, however, on our propositions as to the rules of procedure which we have stated, the plaintiff in error calls our attention to the words "knowingly and willfully" in the third section of the act on which the proceeding is based. These words do not appear in the first section; but the third section imposes a penalty only where the corpo-

ration or person charged "knowingly and willfully fails to comply with the provisions" of the first section. "Knowingly and willfully fails," which is about equivalent to "willfully neglects," is a combination not treated of in the authorities, and means undoubtedly the same as "willfully omits;" but, independently of any verbal criticisms, we do not perceive the effect of the propositions of the plaintiff in error in this connection. The word "willfully" is sometimes used in statutes and indictments, and sometimes omitted from them, for very different reasons. In order that there shall be a punishable evil intent, the criminal law ordinarily requires that there shall be a knowledge of the facts, and when with a knowledge of the facts is combined an injurious result which the actor foresaw, or might reasonably have foreseen, all the law ordinarily implies by the word "willfully" is accomplished. Nevertheless, there are numerous phases of the law where a knowledge of all the facts involved is not required, arising, for example, with reference to questions of adultery and incest, and under statutes in regard to sale of liquors to minors, and the pure food laws, etc. Therefore sometimes, to guard against any possible inference of criminality in the absence of knowledge, the word "willfully" is inserted in the statutes; and sometimes it is inserted for other reasons. In *Potter v. United States*, 155 U. S. 438, 446, 15 Sup. Ct. 144, 39 L. Ed. 214, the Supreme Court seemed to be of the opinion, because the word "willfully" was inserted with reference to offenses denounced in the earlier portion of a certain section, and omitted with reference to offenses denounced in a later part, that it could not be regarded as mere surplusage, and that it implied, not only knowledge, "but a purpose to do wrong," thus giving to it peculiar force. In connection with this decision the expressions of the Supreme Court as to the word "willfully" must be regarded as somewhat confusing. However, in the later cases the court has held, in reference to this word "willfully," that a mere lack of knowledge of the law and intent not to violate the law were not sufficient to escape the statute denouncing the offense, if there was full knowledge of the facts. The case particularly relied on by the plaintiff in error (*Yates v. Bank*, 206 U. S. 158, 180, 27 Sup. Ct. 638, 51 L. Ed. 1002), summing up previous cases, merely distinguishes between negligence and the violation of a statute knowingly. The latest pronouncement of the Supreme Court is found in *Armour Packing Company v. United States*, 209 U. S. 56, 85, 86, 28 Sup. Ct. 428, 52 L. Ed. 681, where it was entirely clear that the Armour Packing Company was proceeding, not only according to what it believed to be the law, but according to such a construction thereof that at least three justices sustained it. This involved a statute which contained the word "willfully," and yet it appears at page 86 of 209 U. S., and page 437 of 28 Sup. Ct. (52 L. Ed. 681), that a knowledge of the facts was all the evidence of guilty intent which the act required. The Circuit Court of Appeals for the Eighth

Circuit, in *Chicago Ry. Co. v. United States*, 162 Fed. 835, has so thoroughly expounded the law and the decisions of the Supreme Court so far as this topic is concerned that we need not follow them further for the purpose of showing, as applied to a case of this character and to allegations such as we have here, that the words "knowingly and willfully," on which the plaintiff in error relies, are of no consequence in this particular case.

However, independently of that fact, we are unable to find anything here to benefit the plaintiff in error, because, if the words "knowingly and willfully" require any thing additional in order to make out the case of the United States, what is required would be additional facts to be proved, leaving unchanged with reference to those additional facts the propositions we have already stated.

The plaintiff in error relies on an occurrence at the trial as follows:

William Waterman, called by the United States, testified that he was at the times in issue agent of the New York Central Railroad Company at Brighton, and that as such he received waybills of merchandise coming from New York, and that he had been summoned to produce certain waybills, but that he did not have them in his possession. The United States then put in evidence the subpoena, which was in sufficient form. The witness then resumed his testimony, admitting that he had been served with the subpoena, and that he had not produced the documents because they had been turned over by him to the persons connected with the legal department of the plaintiff in error. The following occurred, as shown by the record:

"Thereupon counsel for the defendant stated, in answer to an inquiry by the court, that he had in his possession in court the papers referred to in the subpoena, but objected to being required to produce them upon the sole ground that this was in its nature a criminal proceeding and that the defendant could not lawfully be required to produce evidence against itself. The court, upon the request of the district attorney, ordered the counsel for the defendant to produce the said papers for the use of the plaintiff as evidence in the case. To this order the defendant then and there duly excepted, and the exception was duly noted.

"All the waybills called for in the aforesaid subpoena were then produced by counsel for the defendant in compliance with the order of the court, and the testimony of the witness was resumed as follows:

"These waybills [the ones so produced] were at some time in my custody as agent of the New York Central at Brighton. They are the same documents which I turned over on September 30th last to the legal department. They are seven waybills covering shipments of merchandise over the New York Central Railroad from West Albany to Brighton.'

"The plaintiff then offered the said waybills in evidence, and the defendant objected to their admission, stating the ground of his objection to be that the documents themselves were mere waybills, not proved or authenticated in any such way as to make the facts that they purported to state competent evidence against the defendant in this case. The United States attorney stated that he would show that the waybills in question referred to the transactions concern-

ing which penalties were sought to be recovered by the plaintiff. The court admitted the said waybills against the defendant's said objection, and the defendant then and there duly excepted, and its exception was duly noted."

According to the usual practice, the defendant below might have refused to produce the papers, and this would have given the right to the United States to prove their contents by secondary evidence, but would have had no other result. On the court's ordering the production of the papers, the order was not refused; but, if not complied with, it might have been followed by an attempt to punish for contempt, which could have enabled the issue to be raised directly on habeas corpus. Therefore, in any view, it might be questioned whether or not, after all, the production of the waybills was not purely voluntary. In these respects the case is different entirely from *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, where the statute which was held to be unconstitutional provided that, if the papers were not produced, the nonproduction would be a confession of the allegations which it was pretended they would prove. In that case, the papers were, under the circumstances, produced, and the court held the statute unconstitutional, and not only so held, but that the use of the papers at the trial, under the circumstances, furnished a ground of a valid exception.

Notwithstanding *Boyd v. United States*, the usual rule is that, where papers are in fact in court, they may be used in evidence, even though the party who offers them in evidence procured them illegally. *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, and other cases. Indeed, independently of any particular decisions, such has always been understood to be the rule. Under the circumstances of this case, however, it is very evident that the United States might have issued a subpoena to counsel of the defendant, requiring production of the papers; so that, in view of all the facts, it must be held that such a subpoena was waived, and it can not be fairly ruled that the rights of the plaintiff in error are any other than they would have been if the papers had been produced in response to one. Considering that the papers were produced by counsel who were not charged with any offense, and that the suit was against a corporation, we are quite sure, from *Adams v. New York*, already cited, including the review therein of *Boyd v. United States*, at page 598 et seq. of 192 U. S., page 375 of 24 Sup. Ct. (48 L. Ed. 575), and from *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860, and *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, that the plaintiff in error received no legal prejudice from the ruling on this particular point.

In this connection we refer to the fact that the plaintiff in error claims that the waybills themselves were not competent evidence in any view, on the ground, apparently, that they were of a secondary

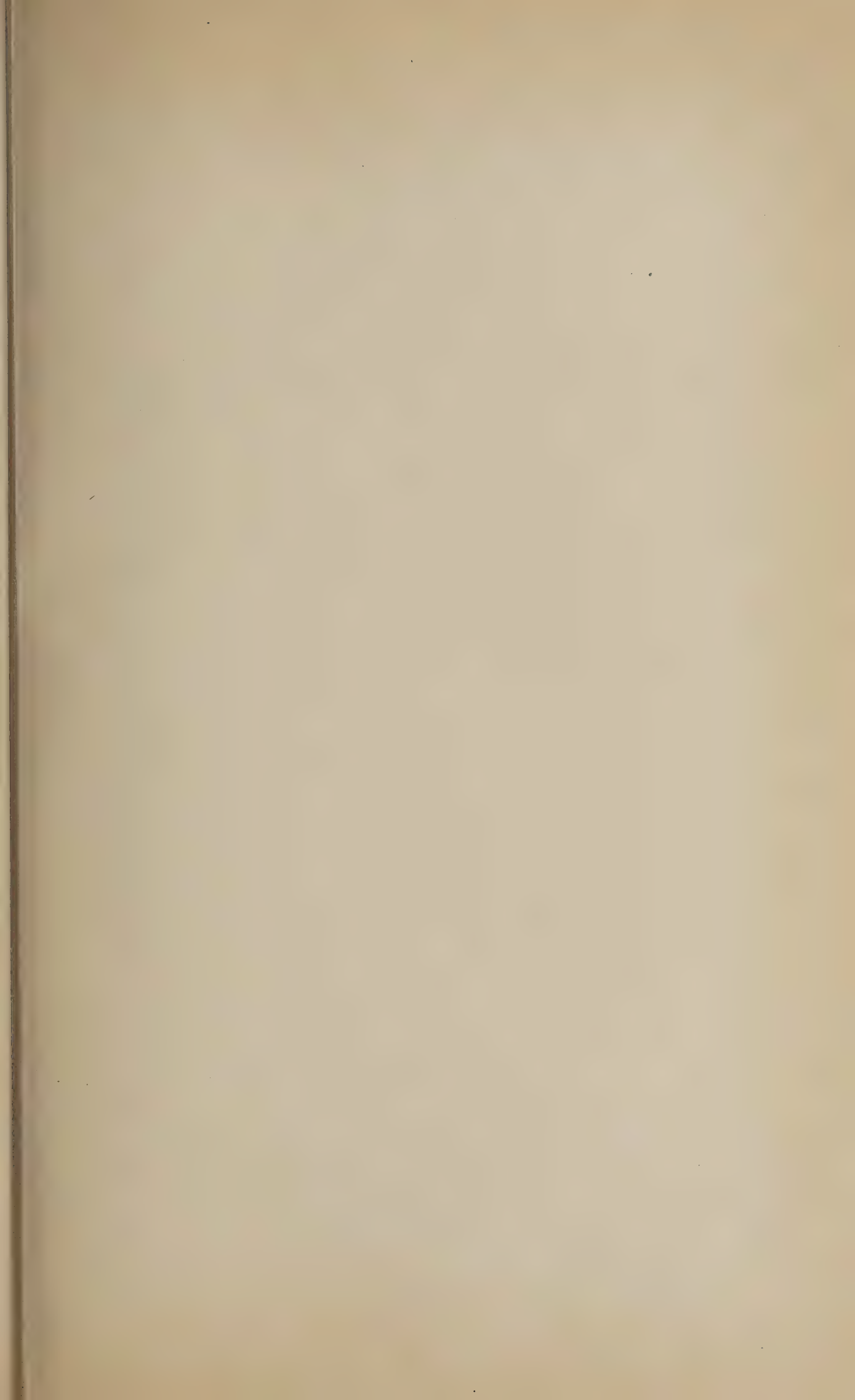
character; but according to the usual practices in connection with the transportation of merchandise over long distances, which are so common that we are entitled to take notice of them, it must be held that they were not only admissions such as the law holds may be made by agents in connection with acts done by them in performance of their duties, but that they were also in fact such acts themselves.

It seems that in one or more of the trains on which the cattle were transported there were several consignments; and, in imposing the penalty, the learned judge of the District Court held that each consignment was a unit under the statute. Undoubtedly the statute is capable of a construction more favorable to the plaintiff in error; but there is so much doubt about it that we see no reason for departing from our usual practice, which leads us to follow the decision of the Circuit Court of Appeals for the Sixth Circuit in *United States v. Baltimore R. Co.*, 159 Fed. 33, 86 C. C. A. 223, in harmony with the ruling of the District Court in this particular.

It is possible there may be some propositions made by the plaintiff in error which we have not noticed, but we are confident there are none which require special attention.

The judgment of the District Court is affirmed.

NOTE BY THE COURT.—Since this opinion came to hand we have received the opinions in *Montana Central v. United States* (C. C. A.) 164 Fed. 400, and *Hardesty v. United States* (C. C. A.) 164 Fed. 420, which are in harmony with our views as to the rule with reference to the use of the waybills and also as to our proposition that, for the most part, the nature of this proceeding is civil, instead of criminal.



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 16.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinion of the Circuit Court of Appeals for the Second Circuit, reversing judgment of the Circuit Court for the Western District of New York, in a case founded on the Act of June 29, 1906, commonly known as the "Twenty-Eight Hour Law."

SYLLABUS OF THE OPINION.*

1. Judgment of the Circuit Court for the Western District of New York in an action founded on the Act of June 29, 1906, commonly known as the "Twenty-Eight Hour Law," imposing a single penalty for the confinement of two independent shipments of cattle contained in the same train, reversed.

2. The ruling of the Circuit Court of Appeals for the Sixth Circuit in *United States v. Baltimore and Ohio Southwestern Railroad Company* (159 Fed. 33) that each independent shipment of animals contained in the same train, and confined without unloading for rest, feed, and water for a period longer than prescribed by the Act of June 29, 1906, commonly known as the "Twenty-Eight Hour Law," constitutes a separate and distinct offense—*approved* and *followed*.

3. The rule that the Government is not entitled to a writ of error to review a judgment in a criminal case in favor of the defendant has no application to an action founded on the Act of June 29, 1906, commonly known as the "Twenty-Eight Hour Law," for recovery of the penalty therein prescribed for confinement of animals in cars for a period longer than allowed by the Act. The action for recovery of the penalty prescribed by this Act is a civil, not a criminal, action. *United States v. Baltimore and Ohio Southwestern Railroad Company*, 159 Fed. 33; and *Montana Central Railway Company v. United States*, 164 Fed. 400.

U. S. CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

UNITED STATES, Plaintiff in error,	}
vs.	
NEW YORK, CHICAGO & ST. LOUIS RAIL- ROAD COMPANY, Defendant in error.	

Before LACOMBE, COXE, and WARD, *Circuit Judges*:

This is a writ of error to review a judgment of the Circuit Court, Western District of New York, which held defendant liable for a penalty of \$200, under the Act of Congress of June 29, 1906, forbidding railroads and certain other carriers from transporting cattle and other live stock confined in cars for a period longer than 28 consecutive

* Not by the Court.

hours without unloading. The train whose management was complained of contained shipments by two different owners, and each shipment was assigned as calling for a separate penalty. Violation of the provisions of the statute is admitted. The judge at circuit court held but a single penalty could be imposed for all shipments by the same train, and the Government has appealed.

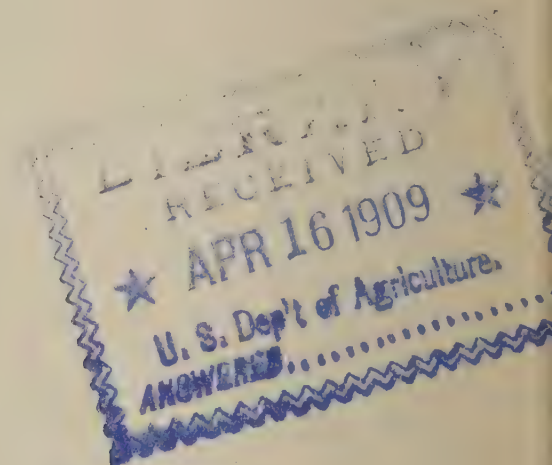
PER CURIAM.

Since the decision below the Court of Appeals in the 6th Circuit has held that each shipment not transported in conformity with the statute constitutes a separate offense. *U. S. vs. Baltimore & Ohio R. R.*, 159 Fed. Rep. 33. We concur in its reasoning and conclusion.

Defendant in error also objects that there can be no review of the judgment by the Government on the ground that this is a criminal action. This point has been overruled in *U. S. vs. Baltimore & Ohio R. R.*, supra, and in the Circuit Court of Appeals for the Ninth Circuit, *Montana Central Ry. vs. U. S.*, 164 F. R. 400.

The judgment is reversed.

O



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 17.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinion of the Circuit Court of Appeals for the Eighth Circuit, in a case involving violation of the Act of Congress of June 29, 1906 (34 Stat. 607), commonly known as the "Twenty-Eight Hour Law."

SYLLABUS.

1. CARRIERS—TRANSPORTATION OF LIVE STOCK—28-HOUR LAW—ACTION TO RECOVER PENALTY—VIOLATION OUT OF THE LIMITS OF A STATE—JURISDICTION.

Neither section 2 of article 3 of the Constitution nor the 6th amendment thereto operates to require that an action to recover a penalty incurred out of the limits of a State, under the 28-hour law, act June 29, 1906, 34 St. 607, ch. 3594, be brought or tried in the district wherein the violation occurs; and such an action lawfully may be brought and tried in the district wherein the defendant resides or carries on business, as is provided in section 4 of that law.

2. SAME—PENAL SECTION CONSTRUED.

The words "knowingly and wilfully" in the penal section of the 28-hour law can not be disregarded, because they describe an essential element of every right to the penalty therein prescribed.

3. SAME—"KNOWINGLY" DEFINED.

"Knowingly" as used in the penal section of the 28-hour law means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as is the case where one carrier receives from another a car loaded with cattle and, with knowledge of how long they then had been confined in the car without rest, water, or food, prolongs the confinement until the statutory limit is exceeded.

4. SAME—"WILFULLY" DEFINED.

"Wilfully" as used in the penal section of the 28-hour law means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.—No. 2818.—
DECEMBER TERM, A. D. 1908.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, <i>Plaintiff in Error</i> , vs. UNITED STATES, <i>Defendant in Error</i> .	}	In Error to the Circuit Court of the United States for the Western District of Missouri.
---	---	---

Mr. W. F. Evans, Mr. E. P. Mann, and Mr. J. T. Woodruff filed a brief for plaintiff in error.

Mr. Leslie J. Lyons, Assistant United States Attorney (Mr. A. S. Van Valkenburgh, United States Attorney, was with him on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, *Circuit Judges*, and W. H. MUNGER, *District Judge*.

VAN DEVANTER, *Circuit Judge*, delivered the opinion of the court.

This was an action to recover a penalty for an alleged failure to comply with the provisions of section 1 of the act of June 29, 1906, 34 St. 607. ch. 3594, known as the 28-hour law. The verdict and judgment were against the defendant and it prosecutes this writ of error.

The alleged failure to comply with the statute occurred in what was then the Indian Territory, and not in the district wherein the action was brought and tried. Because of this, it is urged that the Circuit Court was without jurisdiction, the argument being that a failure to comply with the statute is a crime, that an action to enforce the penalty, even though civil in form, is in effect a criminal prosecution, and therefore that section 2 of article 3 of the Constitution and the sixth amendment thereto require that the trial of such a case be had in the district wherein the failure occurs. There is at least one sufficient reason why this objection to the jurisdiction must fail. Section 2 of article 3 declares in respect of the place of trial for crime: "but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed," and the Supreme Court, in passing upon the effect of that section and of the sixth amendment, has repeatedly held that a crime committed against the laws of the United States, out of the limits of a State, is not local but may be tried at such place as Congress shall designate by law. *United States v. Dawson*, 15 How. 467, 487; *United States v. Jackalow*, 1 Black 484, 486; *Cook v. United States*, 138 U. S. 157, 181. In section 4 of the 28-hour law Congress has directed that the action to recover a penalty incurred thereunder be brought in the district where the failure occurs or in that wherein the defendant resides or carries on business. The defendant is a Missouri corporation and carries on business within the district wherein the action was brought and tried. If, then, it were conceded, which it is not, that such a failure is a crime and that an action to recover the penalty therefor is in effect a criminal prosecution, the jurisdiction of the Circuit Court in this instance would still be beyond question.

The Government's petition, when stripped of details not here material, charged that the defendant while carrying upon its railroad certain cattle in transit from Comanche in the Indian Territory to National Stock Yards in Illinois, failed to comply with the provisions of section 1 of the act before named, in that it unloaded the cattle into a pen at Seneca, an intermediate station, for rest, water, and feeding when the

pen was not properly equipped for these purposes, because, first, it was too small to enable the cattle to obtain required rest; second, there were no water troughs or other facilities in the pen for watering cattle, and, third, there were no hay racks or feed troughs therein into which hay or other feed could be placed for cattle; and that in so failing to comply with the statute the defendant acted both knowingly and wilfully. The answer denied each and all of these allegations.

As properly reflecting the position taken by the Government in the course of the trial, we extract the following from its brief in this court:

"The issues were confined in this very narrow compass, to wit: Were the cattle unloaded by plaintiff in error into pens properly equipped for rest, feed and water? No question is presented * * * as to confinement of the cattle for a period greater than that allowed by law, and no question is involved as to the manner of the unloading, or as to the quantity or quality of the feed and water furnished—the sole question being as to whether or not the plaintiff in error unloaded the cattle into pens properly equipped for rest, feed, and water as required by statute."

At the conclusion of all the evidence the defendant requested that a verdict be directed in its favor, and error is assigned upon the denial of that request. It will be assumed, but without so deciding, that the statute is directed not merely against the continuous confinement of cattle in cars beyond the prescribed period of 28 or 36 hours, as the case may be, without rest, water, or food, but also against unloading them for rest, water, and feeding into pens not properly equipped therefor; that the pen into which these cattle were unloaded was not properly equipped in the sense of the statute, and that ordinarily to unload cattle into such a pen for rest, water, and feeding is to fail to comply with the statute; and with these matters so disposed of we will consider only whether there was any substantial evidence from which the jury reasonably could have found that the defendant knowingly and wilfully failed to comply with the statute in this instance. We say "knowingly and wilfully" because, as was recently said by Judge Adams in speaking for this court, "it appears that sec. 1 creates a duty to be performed by carriers and that sec. 3 imposes a penalty not for the failure to perform the duty but only when the carrier 'knowingly and wilfully' fails in that regard." *United States v. Union Pacific R. R. Co.* — C. C. A. —, — Fed. —. (See Circular 14, Office of Solicitor.) The qualifying words can not be disregarded; they mean something and whatever that may be is an essential element of every right to the penalty. "Knowingly" evidently means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as is the case where one carrier receives from another a car loaded with cattle and, with knowledge of how long they then had been confined in the car without rest, water, or food, prolongs the confinement until the statutory limit is exceeded. "Wilfully" means something not expressed by "knowingly," else both would not be used conjunctively. And pre-

sumptively it means something not expressed by "willingly," else the change from that word would not have been made when the old statute (Rev. St. secs. 4386-4390) was being re-enacted. *Crawford v. Burke*, 195 U. S. 176, 190; *Hopper v. Denver, etc., Co.*, 84 C. C. A. 21, 24, 155 Fed. 273, 276. But it does not mean with intent to injure the cattle or to inflict loss upon their owner, because such an intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. *United States v. Union Pacific R. R. Co.*, *supra*. So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

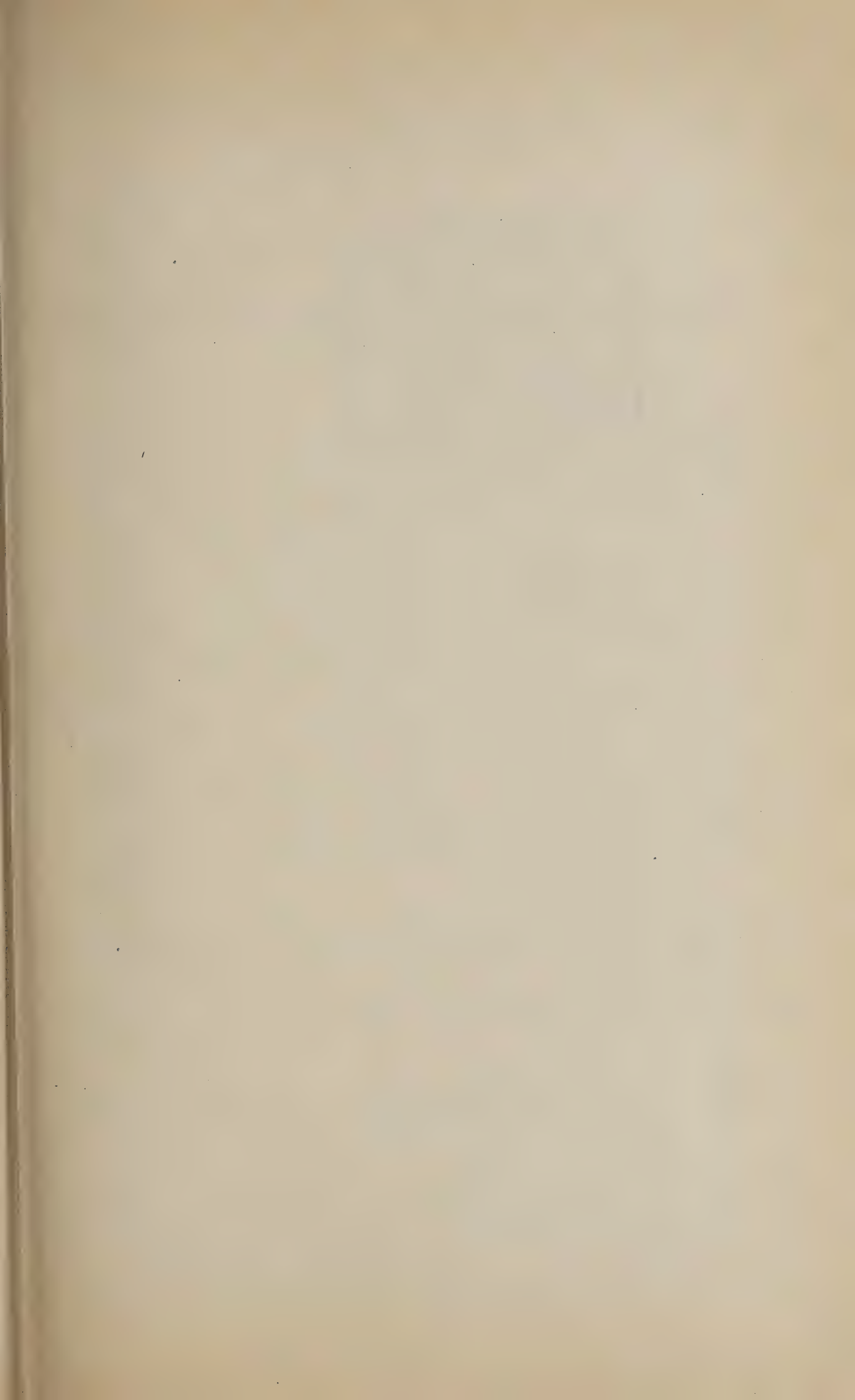
The evidence was practically free from contradiction and established these facts: The pen at Seneca afforded approximately 48 square feet of space for each animal, or about the space embraced in an ordinary stall in a stable. The ground therein was dry and in good condition and the surrounding fence was sufficient. Cattle unloaded therein could be watered by driving them along a public lane to a creek distant 515 yards from the pen, and they could be fed in the pen by strewing hay about upon the ground. These cattle were watered and fed in that way, but not as advantageously as if proper facilities for supplying their needs had been present in the pen. Seneca was a small way station and the pen there was seldom used for resting, watering, and feeding cattle, and then only in cases of emergency. The defendant maintained extensive and properly equipped pens for those purposes at Monett and Springfield, which are respectively 43 and 87 miles east of Seneca. When these cattle were loaded into the cars at Comanche, which was on the line of a connecting carrier, the period of confinement was extended from 28 hours to 36 hours at the written request of the person in custody of the cattle, and that was done in the reasonable expectation on the part of both the custodian and the connecting carrier that the cattle could be carried to Monett or Springfield within that period. And when the cattle were started from the connecting point, at which they were delivered to the defendant, there remained enough of the 36 hours to justify a reasonable expectation that the run to Monett or Springfield could be completed within that time. No storm or bad weather intervened, but other occurrences in the course of the run produced such delays that 35 of the 36 hours were gone when the cattle reached Seneca. Monett could not be reached within the remaining hour, and it was in that situation that the cattle were unloaded at the Seneca pen for rest, water, and feeding. They were not unloaded, rested, watered, or fed between Comanche and Seneca. When the defendant obtained knowledge of how long the cattle had been confined in the cars without rest, water, or food before they were delivered to it was not shown, save as it appeared that it had knowledge thereof when they reached Seneca.

There was no claim that the occurrences producing the delay after the run from the connecting point was begun should have been foreseen before that run was undertaken, or that the defendant did not exercise reasonable diligence to reach Monett within the 36 hours, or that the cattle were carried by any properly equipped pen after it became reasonably certain that Monett could not be reached within that period, or that the defendant did not maintain properly equipped pens sufficient in number and location to meet the requirements of the traffic reasonably to have been anticipated, or that it should have proceeded with the cattle to Monett instead of unloading them at Seneca, but on the contrary the sole claim was that the pen was not properly equipped in the sense of the statute. Indeed, after filing the petition, the Government seems to have proceeded as if the qualifying words "knowingly and wilfully" were not in the penal section, and in its brief in this court it is said: "The issue in the case is confined to the one proposition, viz: Was, or was not, the pen into which these cattle were unloaded by the defendant company properly equipped for resting, watering, and feeding? If it was not, then the defendant company is guilty."

The same omission occurred in the court's charge to the jury, no reference being made therein to the qualifying words of the penal section or to their effect upon the Government's asserted right of recovery.

Without question the defendant, at the time of unloading the cattle into the pen at Seneca, had full knowledge of its size and state of equipment and designed to use it in resting, watering, and feeding the cattle, but considering the unexpected situation or emergency in which the defendant, without any claimed fault on its part, was required to act, and considering the fitness of the pen for use in such an unexpected situation or emergency, we are of opinion that it reasonably can not be said that the defendant had a free will or choice and either intentionally disregarded the statute or was plainly indifferent to its requirements. Indeed, it would better comport with reason to say that, in the circumstances, the defendant manifested a disposition to respect the statute as nearly as it could, rather than to disregard or be indifferent to it. It follows, as we think, that the request for a directed verdict in the defendant's favor ought to have been sustained.

The judgment is accordingly reversed with a direction for a new trial.
Filed March 17, 1909.





LIBRARY

RECEIVED

★ APR 28 1909 ★

U. S. Dep't of Agriculture.

ANSWERED.....

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 18.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinion of the Circuit Court of Appeals for the Eighth Circuit, in cases involving violations of the Act of Congress of June 29, 1906 (34 Stat. 607), commonly known as the "Twenty-Eight Hour Law."

SYLLABUS.

1. APPEAL AND ERROR—TRIAL TO DISTRICT COURT WITHOUT A JURY—REVIEW.

Where an action at law in a district court, triable by jury under Rev. St., sec. 566, is by consent of the parties tried to the court without a jury, no question of fact or law decided upon or in connection with the trial is subject to reexamination in an appellate court.

2. SAME—REV. ST., SECS. 649, 700, HAVE NO APPLICATION TO DISTRICT COURTS.

Rev. St., secs. 649, 700, providing for waiving a jury and for the review of judgments rendered in causes where there is such a waiver, relate exclusively to trials in the circuit courts and there are no similar provisions in respect of trials in the district courts.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.—No. 2792.—
DECEMBER TERM, A. D. 1908.

UNITED STATES, <i>Plaintiff in Error</i> ,	}	In Error to the District Court of the United States for the Eastern District of Arkansas.
vs.		
ST. LOUIS, IRON MOUNTAIN AND SOUTH- ERN RAILWAY COMPANY, <i>Defendant</i> <i>in Error</i> .		

Mr. William G. Whipple, United States Attorney, and Mr. Powell Clayton, Assistant United States Attorney, filed a brief for the plaintiff in error.

Mr. T. M. Mehaffey and Mr. J. E. Williams filed a brief for the defendant in error.

Before SANBORN and VAN DEVANTER, *Circuit Judges*, and AMIDON,
District Judge.

VAN DEVANTER, *Circuit Judge*, delivered the opinion of the court.

By its complaints in four separate actions in the district court, the United States sought to recover from the St. Louis, Iron Mountain and Southern Railway Company penalties for nine alleged failures to com-

ply with the act of June 29, 1906, 34 St. 607, ch. 3594, known as the 28-hour law. The defendant answered in each case, putting in issue all the allegations of the complaint, and the cases, after being consolidated for purposes of trial, were tried to the court pursuant to a written stipulation waiving a jury. The judgment entry shows that the court, "having heard the evidence," found for the defendant as to two of the alleged failures and for the plaintiff as to the others, but with the qualification that the latter constituted three, and not seven, failures, and then rendered judgment accordingly. About a month thereafter a bill of exceptions was tendered by the plaintiff and allowed by the court, wherein it was recited that "subsequently to the said trial and the judgment of the court," a so-called agreed statement of facts was entered into by the parties. This agreed statement, after saying, "It is hereby stipulated and agreed by and between the above-named parties that the evidence adduced on the trial of said cause fully sustained the findings of fact herein set forth as distinguished from the conclusions of law," sets forth what purports to be a special finding of the facts with the court's conclusions of law thereon and then recites that the plaintiff excepted to the conclusions of law and to the application of them to the facts as found. Apparently it was because of these conclusions of law that the court found, as shown in the judgment entry, that what was charged as seven failures constituted but three. The case is now here upon a writ of error sued out by the plaintiff, and its only contention is that the court erred in its conclusions of law relating to the number of failures.

None of the complaints alleged in terms or in effect that the defendant "knowingly and wilfully" failed to comply with the statute (see *United States v. Union Pacific R. R. Co.*, — C. C. A. —, — Fed. — (*); *St. Louis & San Francisco R. R. Co. v. United States*, — C. C. A. —, — Fed. —, (†) both recently decided by this court), and the purported special finding is not shown otherwise than in the bill of exceptions (see *Insurance Co. v. Boon*, 95 U. S. 117, 124; *United States v. Cleage*, — C. C. A. —, 161 Fed. 85; *United States v. Sioux City Stock Yards Co.*, — C. C. A. —, — Fed. —), but, if these matters be put out of view, there is yet an insuperable objection to the consideration of the contention made by the plaintiff. It is, that in actions at law in the courts of the United States, if the questions of fact are by consent of the parties determined by the court without a jury, no ruling made in that connection can be reviewed upon a writ of error, in the absence of a statute providing otherwise. In a limited sense, sections 649 and 700 of the Revised Statutes do provide otherwise in respect of the circuit courts, but those sections are in terms con-

* See Circular No. 14 of the Office of the Solicitor.

† See Circular No. 17 of the Office of the Solicitor.

fined to the circuit courts and there is no like provision in respect of the district courts. As illustrating that this is so, it is enough to refer to the case of *Rogers v. United States*, 141 U. S. 548. That was an action at law in a district court which was tried to the court pursuant to a written stipulation waiving a jury. The court "heard the testimony of the witnesses," made special findings of the facts with its conclusions of law thereon and thereupon gave judgment for the plaintiff. A bill of exceptions was also allowed embodying the evidence, the court's ruling upon a motion for a peremptory finding for the defendant in the nature of a directed verdict and the exception to that ruling, as also other exceptions to the findings and decision, and the case was afterwards taken by the defendant to the Supreme Court upon a writ of error. That court held, although the question was not raised by counsel, that all it could do, in view of the mode of procedure which the parties had chosen to follow, was to affirm the judgment. In the course of the opinion it was said:

"There was no statute in existence which provided for the trial in the District Court by the court without a jury. It is provided by § 566 of the Revised Statutes that 'the trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury.' The provision for waiving a jury, in § 649 of the Revised Statutes, applies only to the Circuit Court, as does also a special provision of § 700, in regard to the review by this court of a case tried in the Circuit Court by the court without a jury. There are no similar provisions in regard to trials without a jury in the District Court, to those found in §§ 649 and 700 in respect to Circuit Courts."

"It is true that, in the District Court, in a suit otherwise triable by a jury, the parties may, by stipulation, waive a jury and agree on a statement of facts, and submit the case to the court thereon, for its decision as to the law. (*Henderson's Distilled Spirits*, 14 Wall. 44, 53.) That might have been done also in the Circuit Court, without any statute to that effect. (*Campbell v. Boyreau*, 21 How. 223, 226, 227.) This, however, is not the finding of issues of fact by the court upon the evidence. The provisions of §§ 649 and 700 relate wholly to such finding, and not at all to the action of the court upon an agreed statement of facts."

And then referring to the authority of the federal appellate courts in reviewing judgments at law prior to the enactment of the statute embraced in Rev. St. secs. 649, 700, it was further said:

"The extent of that authority was settled by the case of *Campbell v. Boyreau*, before cited. That was a suit at law in a Circuit Court. The whole case having been submitted to the court upon the trial, and a jury having been expressly waived by agreement of parties, evidence was offered on both sides. The court found the facts, and then decided the questions of law arising upon such facts, and gave judgment for the plaintiff. The defendants sued out a writ of error from this court. There were in the record bills of exception, which showed exceptions

by the defendants to the admissibility of evidence, and exceptions to the construction and legal effect which the court gave to certain instruments in writing. But this court held that, in the mode of proceeding which the parties had seen proper to adopt, none of the questions, whether of fact or of law, decided by the Circuit Court, could be reexamined by this court upon a writ of error. The opinion of this court, delivered by Chief Justice Taney, cited to that effect *Guild v. Frontin*, 18 How. 135; *Suydam v. Williamson*, 20 How. 427, 432, and *Kelsey v. Forsythe*, 21 How. 85, and said: 'The finding of issues of fact by the court upon the evidence is altogether unknown to a common law court, and can not be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, can not regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impanelled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court can not regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit Court had jurisdiction of the subject matter and the parties, and there is no question of law or fact open to our reexamination, its judgment must be presumed to be right, and on that ground only affirmed.'"

That decision was followed and applied by this court in the recent case of *United States v. Cleage*, *supra*.

As here, by consent of the parties, the trial was to the district court without a jury, and the court "heard the evidence" and based its finding and judgment thereon, and as the case was not submitted upon an agreed statement of facts for the court's decision of the questions of law thereon, it follows that none of the questions decided by the court in determining the facts or in applying legal conclusions to them are open to reexamination upon this writ of error.

The judgment is accordingly affirmed.

Filed March 25, 1909.

Issued June 30, 1909.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 19.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinion of Holt, J., for the Western District of New York, in case involving violation of the Act of Congress of June 29, 1906 (34 Stat. 607), commonly known as the "Twenty-eight Hour Law."

SYLLABUS.¹

1. The Twenty-eight Hour Law is a humane act, intended to prevent cruelty to animals and also to protect the interests of the owners of animals and of the public as well.

2. The Twenty-eight Hour Law can not be so construed as to permit the owner of live stock to file a general request, with the railroad company, applicable to all his shipments in the future, and thus nullify the intent of Congress to make the term of confinement twenty-eight hours instead of thirty-six hours.

3. There should be a separate, written request for each particular shipment.

UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

PERE MARQUETTE RAILROAD CO., *Defendant*.

No. 211.

John Lord O'Brian, U. S. Attorney.

Moot, Sprague, Brownell & Marcy, for defendant.

HOLT, J.:

This action is brought to recover a penalty under the act of June 29, 1906, entitled "An act to prevent cruelty to animals while in transit," commonly called the 28-hour act. The act (34 Stat. at L., pt. 1, p. 607) provides, in substance, that no railroad transporting cattle between the States shall confine them in cars—

"for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written

¹ Not by the court.

request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated."

The essential facts in this case are that on October 5, 1907, at 12.30 p. m., cattle were loaded on the cars of the defendant company at Deckerville, Mich., consigned to the stock yards at Buffalo, N. Y. The defendant transported these cars out of Michigan, across Canada, and delivered them at Niagara Falls, N. Y., into the hands of the New York Central & Hudson River Railroad Company on October 6, 1907, at 5.50 p. m. The cattle were thus in transit, in the custody of the defendant, without being unloaded for rest, water, and feeding, for a period of thirty hours and twenty minutes. No written request for the extension of the time of this particular shipment was ever made, but some time previous, in the year 1906, the owner of these cattle had filed with the agent of the defendant at Deckerville, Mich., a written request, in general terms, asking that the time of confinement of all future shipments of cattle made by him be extended from twenty-eight hours to thirty-six hours without rest, food, or water. George L. Jones, the owner of the cattle, went on the same train, taking care of them, and at the time of the shipment of these particular cattle, said Jones made a verbal request, by telephone, of the agent of the defendant at Deckerville, that the thirty-six hour clause, so far as rest, food and water were concerned, should apply to said shipment. The cattle arrived at Niagara Falls in good condition.

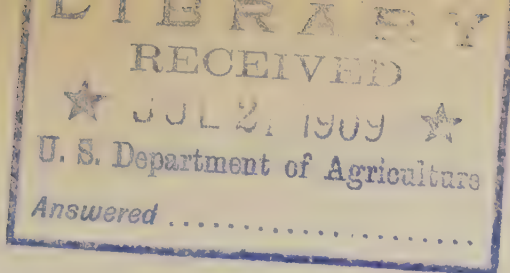
The Government claims that a general written request by an owner of cattle that in all future shipments the time of confinement may be extended to thirty-six hours is not permitted by this act, and that a special written request must be made for such extension, if desired, in the case of each particular shipment, and this case is understood to be a test case to have that question determined. The language of this statute is not very clear. It appears to give an absolute right to any owner of cattle, by filing a written request with the railroad company, to have the time of confinement of his cattle extended from twenty-eight to thirty-six hours. If an owner has such a right, it does not seem to be very important whether it is exercised once for all by a single request, applicable to all future shipments, or by filing a separate request in respect to each particular shipment. It is argued that the term "contingencies hereinbefore stated," contained in the final portion of the act above quoted, refers to the contingencies previously referred to of "storm or other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and

foresight." These grounds of excuse for the carrier for not discharging the cattle within twenty-eight hours seem to be occurrences arising after the shipment has begun, which, in most cases, at least, could not be foreseen before the shipment, and I think that the term "contingencies hereinbefore stated" includes both the case where the carrier is prevented from unloading by storm or other accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, and the contingency of the owner having filed a written request extending the time of confinement from twenty-eight to thirty-six hours.

I think, however, that the provision that the written request must be made by "the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form," tends to show that it was the intention of Congress that, if the time was to be extended to thirty-six hours, there should be a written request in the case of each particular shipment. The provision that the request should be separate and apart from any printed bill of lading or other railroad form suggests that Congress had in mind the possibility of a railroad carrier inserting a general request of that kind in papers to be signed by shippers, with a view of generally extending the time of confinement of all shipments of cattle from twenty-eight to thirty-six hours, and I think that Congress, therefore, intended that the owner or shipper of cattle should exercise his judgment as to the necessity of additional time in a distinct instrument, executed by himself, in respect to each shipment, and this conclusion is strengthened by the concluding statement in the act that it is "the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated." The act is a humane act, intended to prevent cruelty to animals, and the act also has in view the protection of the interests of the owners of the animals and of the public, in preventing their health and condition being injured in transit. As it is the declared policy of Congress that twenty-eight hours shall be the general term of confinement, and thirty-six hours only permitted in certain contingencies, I think that no construction of the statute should be allowed which would make it possible for an owner of cattle, either acting in his own interest or at the dictation of a railroad company, by filing a general request applicable to all future shipments, to nullify the general declared intent of Congress by making the term of confinement in all cases thirty-six hours, instead of twenty-eight hours.

My conclusion is that there should be judgment for the plaintiff for \$100, and costs.

June 14, 1909.



Issued July 15, 1909.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 20.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Charge of Bean, J., to the Jury in a case involving a violation of the Act of June 29, 1906 (34 Stat. 607).

SYLLABUS OF THE CHARGE.*

1. Under the Twenty-eight Hour Law, the shipper can not relieve the common carrier from the penalty provided by the act; he can only extend the time of confinement to thirty-six hours.

2. Under the Twenty-eight Hour Law, a "properly equipped pen" is one which will reasonably provide for resting, feeding, and watering live stock. Whether any pen is reasonably equipped in a given case is a question for the jury.

3. The word "knowingly," as used in the act, means with knowledge of the facts; the word "willfully" means intentionally and voluntarily.

4. Under the Twenty-eight Hour Law, the United States is required to prove its case by a preponderance of the evidence.

5. Under the Twenty-eight Hour Law, the jury should assess the penalty.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

UNITED STATES, <i>Plaintiff</i> ,	}	Agriculture case No. 1757. No. 3476.
<i>vs.</i>		
SOUTHERN PACIFIC COMPANY, <i>Defendant</i> .		

INSTRUCTIONS OF JUDGE BEAN, GIVEN ORALLY.

GENTLEMEN OF THE JURY: In June, 1906, Congress passed a law to prevent cruelty to animals while in transit by rail from one State into or through another, which prohibits any railroad company from confining such animals in a car for a period longer than twenty-eight consecutive hours without unloading them in a humane manner into properly equipped pens for rest, water and feeding, for a period of at least five hours, unless prevented by storm or by other accidental or unavoidable

*Not by the court.

causes which can not be anticipated or avoided by the exercise of due diligence and foresight. Upon the written request of the owner or person in custody of the particular shipment, the time of confinement may be extended to thirty-six hours, but the law absolutely prohibits the continuous confinement of stock in cars while in transit more than thirty-six hours under any circumstances, unless the company is prevented from unloading them by storm, or other accidental or unavoidable causes, which could not be anticipated or avoided by the exercise of due diligence and foresight.

OBJECT AND PURPOSE OF THE STATUTE.

The object and purpose of this act is to prevent or reduce to a minimum the cruelty incident to the transportation of live stock over railway lines, and at the outset, I desire to call your attention to the fact that this is not a controversy between the owner of the stock and the railway company, nor is it an action brought by the Government against the railway company to recover damages suffered by itself, or anyone else, but it is an action brought to recover the penalty which the statute imposes upon a railway company which violates its provisions. And it would not be possible, under this law, for the shipper or person in charge of the stock to relieve the company from the penalties herein imposed by his consent or agreement. The only thing that the shipper can do that will aid the company is to extend the time of confinement from twenty-eight to thirty-six hours. When stock is delivered to a railroad company for shipment from a point in one State to a point in another State, it is, during the time of shipment, in charge of and under the care of the company, and the statute imposes a duty upon the company which it is required to observe, regardless of the wishes of the shipper, except in the instances that I have stated.

I call your attention to this phase of the law, because there has been a good deal said during the trial about what the man in charge of the stock at the time the shipment reached Junction City said and did with reference to the place where the stock should be unloaded and fed, so as to impress upon your minds the fact that he had no authority by any act of his to relieve the company from the penalty provided by the statute, if it violated its provisions.

The charge in this complaint is that the railroad company failed to observe the provisions of the act of Congress by unloading the stock at Junction City into pens for rest, water, and feed which were not properly equipped for that purpose. The averments of the complaint are denied by the answer, and this denial makes the issue in the case. So that really the only substantial question for you to determine is whether the pens into which the stock was unloaded by the railway company at Junction City were properly equipped, so that the stock could be properly fed, watered, and could rest.

WHAT ARE "PROPERLY EQUIPPED PENS?"

The statute does not define what shall be considered properly equipped stock pens. It simply requires that they shall be properly equipped for certain purposes, and it therefore becomes necessary in this case to determine whether, under the circumstances and from the testimony, the pens into which the stock was unloaded were in fact properly equipped, and that is the question for you under the testimony.

There is no provision in the law that the pens shall be provided with watering troughs, or with racks for feeding stock, or that they shall be covered, or that the ground shall be dry, or the pen floored, or anything of that kind. As I said to you, it simply requires that they shall be properly equipped so that the stock may be rested, may be fed, and may be watered, and in determining that question you are to bear in mind that the law is made to apply to the transportation of stock, and it is not supposed or not presumed that these pens along the line of railways, used for the purpose of feeding, watering, and giving stock an opportunity to rest, will be provided with the same equipment as a barn or structure erected for the purpose of feeding stock, fattening them for the market, or anything of that kind, but it must be such an equipped pen as will reasonably provide for these matters.

And it is a question in this case for you to determine whether the pens into which the stock was unloaded by this company were of that kind.

There has been considerable said about the company having made some arrangement with Mr. Washburn, who lives a mile, or a mile and a quarter, or a mile and a half—some distance you will remember from the testimony—from the depot, by which stock could be taken from the railway pen to his farm and there fed. So far as the testimony on that question is concerned, it can only have a bearing on the case now under consideration as it may tend to show whether the company unloaded the stock into the pens at Junction City, knowingly and willfully, under the definition of these terms which I shall hereafter give you.

The law imposed upon the railway company the duty of unloading the stock into properly equipped pens, and if it had a pen half a mile, or a mile from its track or station, and it did not unload the stock in, or take them to that pen, but unloaded them into a pen in its railway yard, it would be no defence, if you believe the pens into which the stock was unloaded were not properly equipped. Nor would it be a defence for the railroad company to say that the reason it did not take the stock to the Washburn pen, as it was called, was because the man in charge refused to consent thereto. He had no control over this matter. The law makes it the positive duty of the railway company to see that the stock was unloaded into suitable and properly equipped pens; and if it had a properly equipped pen, and unloaded the stock

into a pen which was not properly equipped, it violated the terms of this statute, and it is no defence to say that the man in charge of the stock would not consent to the removal of the stock to proper pens, because that duty is imposed upon the company and not upon the shipper.

“KNOWINGLY AND WILLFULLY” DEFINED.

Now, this statute provides that any railway company that knowingly and willfully violates its terms shall be liable to a certain penalty, and therefore, before you can find a verdict for the Government, if you believe the pen in which stock was confined was not properly equipped, you must further find that the action of the company was knowingly and willfully done. The word “knowingly,” as used in the law, simply means with knowledge of the facts. If the pen was not properly equipped for the purposes stated in the statute, and that fact was known to the railway company or its agents, or if by the exercise of reasonable diligence it could have known its condition, and it unloaded the stock into it, then it did it knowingly. “Willfully,” as used in this statute, means intentionally and voluntarily. So that if it should appear from the testimony that the unloading of the stock into the pen was done by the railroad company or its agent with knowledge of the facts and voluntarily, it was done willfully and knowingly within the meaning of the law.

There has been some testimony about the feeding of this stock after they were unloaded into the pen. The act of Congress under which this action was brought makes it the duty primarily of the shipper to feed the stock. If he neglects or refuses to do so, then the duty is imposed upon the railway company, and it must provide the necessary feed and water, and is given a lien on the stock for the cost thereof. But in this case there is no charge that the railway company neglected to feed the stock, and the testimony shows, and about that there is no controversy, that the owner, the man in charge of the stock, undertook to feed them himself, and therefore there can be no finding against the railway company on that feature of the case. There was some evidence admitted as to the amount of hay that was purchased by the custodian of the stock for the purpose of feeding. That is only competent for whatever you may consider it worth as tending to show the condition of the pen. Whether this man purchased more hay than was necessary to feed the stock, or whether he was wasteful in feeding it are matters that are only important in determining whether the condition of the pen was such as to require more hay than would have been required if it had been properly equipped. The matter is only important in determining the condition of the pen.

It is in evidence and admitted, I believe, that there was no feed rack in the pen, and it was necessary to feed the stock on the ground. The contention of the Government is that because of the mud it required

about 1,400 pounds of hay, when four or five hundred would have been sufficient had the pen been properly equipped for feeding purposes, and it is for that reason this evidence was admitted, and it is your duty to consider it for that purpose.

There is also some evidence that the railway company was engaged at the time this shipment was unloaded at Junction City in building new feeding pens. That evidence is not to be considered by you as indicating that the pen into which the stock was unloaded was, in fact, not properly equipped. The condition of the pen into which the stock was unloaded is to be determined from the evidence in the case, and not from what the company was doing at that time in regard to new pens. There may have been many reasons which prompted it to construct new pens. The testimony is that the pen in use at this time was not large enough to accommodate full train loads of stock and that they were obliged to drive them to the Washburn pasture. This may have been the reasons actuating the company in the construction of the new pens, or there may have been other reasons, which are not disclosed by this testimony, and not necessary to be disclosed in this case. You can draw no inference against the company from the fact that they were building new pens. You are to determine the condition of the pen into which this stock was unloaded, and whether or not it was properly equipped from the testimony that has been offered in this case.

RULE OF EVIDENCE AS TO BURDEN OF PROOF.

There are some general rules of evidence applicable to cases of this kind, and among others is the one in regard to the burden of proof. The complaint alleges and the Government charges that the defendant company knowingly and willfully unloaded the stock into a pen which was not properly equipped for feed, water, and rest. Upon that question, the burden of proof is upon the Government. As explaining what I mean by "burden of proof," I read to you a quotation from a charge given by Judge DeHaven in a case brought by the Government under this same law:

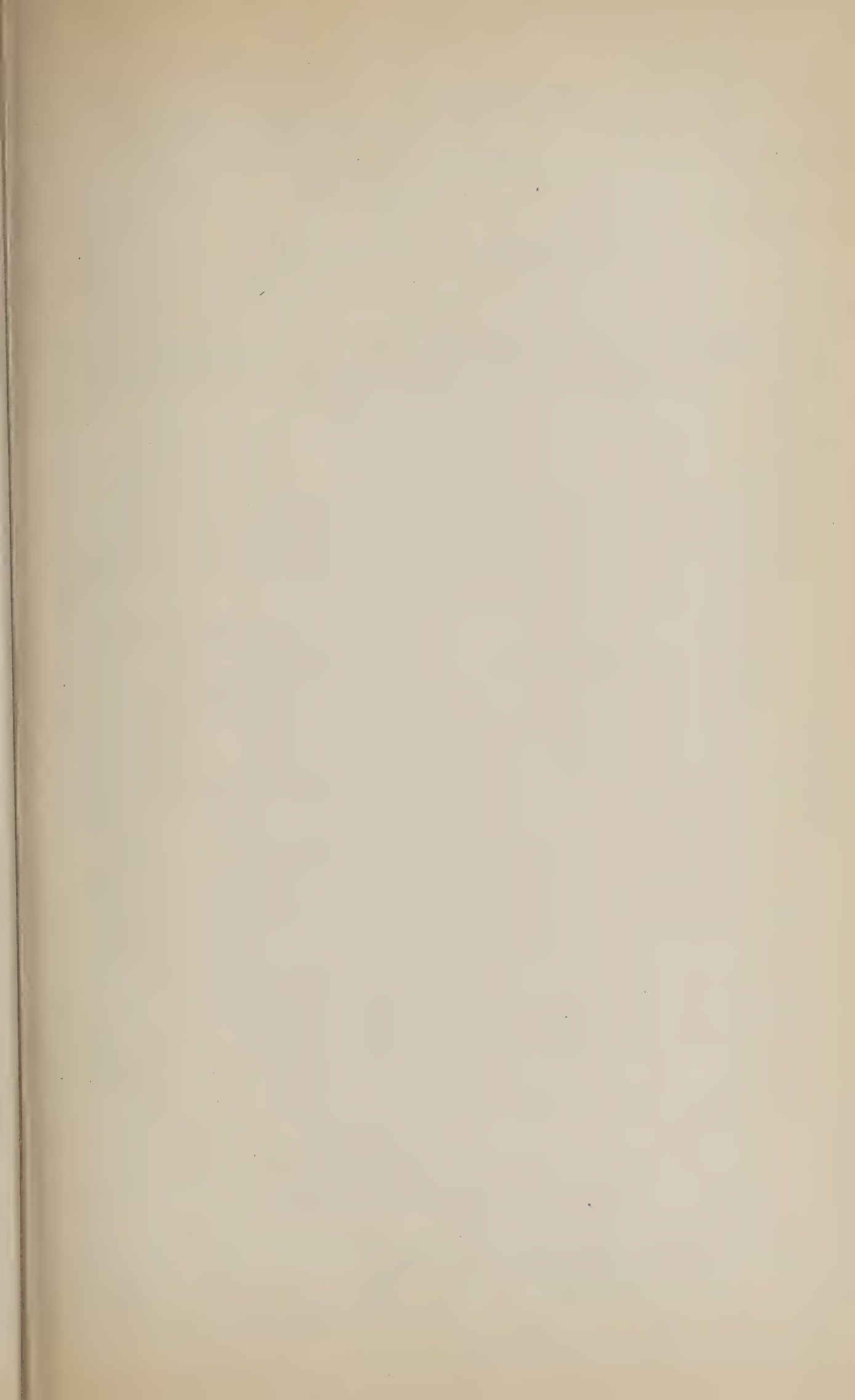
"The burden of proof is upon the Government, and it is required to prove the acts constituting a violation of this statute by the preponderance of the evidence, that is to say, they are not required to prove it beyond all reasonable doubt, but simply by a preponderance of the evidence, and by 'preponderance of evidence' is meant that evidence which, after a consideration of all the evidence, is, in the judgment of the jurors, entitled to the greatest weight. Or, stated in this way, the phrase 'preponderance of evidence' means that the testimony which points to a certain conclusion appears to the jury to be more credible and probable than the testimony to the contrary. It means such evidence as when weighed with that which opposes it has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden of proof rests."

JURY TO DETERMINE AMOUNT OF PENALTY.

The statute under which this action is brought imposes or provides for a penalty for its violation, of not less than one hundred nor more than five hundred dollars, and if you find a verdict in favor of the Government and against the defendant, it will be necessary for you to determine the amount of the penalty, not less than one hundred dollars nor more than five hundred dollars, and insert that amount in your verdict.

Now, gentlemen, you are the exclusive judges of all questions of fact in this case. You are to determine the facts from the testimony as you understand it, and not from what counsel or the court may have said about the facts. That is peculiarly within your province, and you are also the judges of the credibility of the witnesses, and the weight to be given to their testimony. You have heard them testify. You have noted their appearance upon the witness stand, and it is for you and you alone to determine what weight shall be given to their statements. You are not bound to find your verdict in conformity with the greater number of witnesses. You are to find from the facts as you understand them from the testimony, keeping in view the rule I have given you and the definitions I have given you of the words "knowingly" and "willfully," and as to on whom rests the burden of proof.

NOTE.—The case in which this charge was delivered was tried on June 16, 1909, and on June 17, 1909, the jury returned a verdict for the United States and fixed the penalty at \$250.



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 21.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Fourth Circuit, reversing decision of the District Court for the Eastern District of Virginia, in a case involving violation of the Twenty-eight Hour Law (Act of June 29, 1906; 34 Stat. 607).

SYLLABUS.¹

1. The purpose of the Twenty-eight Hour Law is to prevent any carrier from transporting animals in interstate commerce for a longer period than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water, and feeding, for at least five consecutive hours.

2. A suit to recover a penalty under the Twenty-eight Hour Law is treated as being a civil proceeding.

3. The words "knowingly and willfully" in the Twenty-eight Hour Law do not import an evil intent or motive. Lack of foresight and due diligence on the part of agents of a carrier engaged in the transportation of live stock is imputable to the carrier, and the consequent failure of agents, having knowledge of the facts concerning a particular shipment, to comply with the requirements of the law is a willful failure, notwithstanding such precautions as the carrier may have taken to insure strict compliance by its conductors, agents, and other persons.

4. The failure of a conductor to examine a waybill on which a shipment of calves is noted is negligence on the part of the defendant company, and if in consequence the calves are confined beyond the period permitted by the Twenty-eight Hour Law the carrier is liable to the penalty thereby prescribed. It can not be contended that such failure was an "accidental or unavoidable" cause which could not have been anticipated or avoided by the exercise of due care and foresight, within the meaning of the statute.

5. The statute does not definitely fix the penalty, but prescribes for each violation a sum of not less than one hundred nor more than five hundred dollars. Determination of the amount which may be assessed in a particular case is a matter of discretion to be exercised by the trial court.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

THE UNITED STATES, Plaintiff in error,	}	No. 893.
<i>vs.</i>		
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant in error.		

In error to the District Court of the United States for the Eastern District of Virginia, at Norfolk.

¹ Not by the court.

Argued May 14, 1909. Decided July 14, 1909.

Before PRITCHARD, Circuit Judge, and KELLER and McDOWELL, District Judges.

L. L. LEWIS, United States attorney, for plaintiff in error, and WM. B. McILWAINE and D. TUCKER BROOKE for defendant in error.

This is a writ of error to a judgment of the District Court for the Eastern District of Virginia, rendered in an action of debt wherein the United States was plaintiff, and the Atlantic Coast Line Railroad Company, a corporation engaged in interstate commerce, was defendant. This action was brought to recover a penalty of five hundred dollars for a violation of the act of June 29, 1906, known as the twenty-eight hour law. The first section of the act reads as follows:

“* * * No railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: Provided, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: Provided, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit, to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.”

The declaration states that on the 15th day of April, 1907, the defendant company was, and has ever since been, a common carrier and railroad corporation, operating a road over which cattle, sheep, swine, and other animals are conveyed from the State of North Carolina into the State of Virginia, and that on the said 15th day of April it undertook and promised to convey from Aulander, in North Carolina, to Norfolk, in Virginia, certain cattle, namely, three calves, for which a bill of lad-

ing in due form was made out and delivered by the defendant to the consignor; that on the same day the calves were loaded by the defendant in one of its freight cars at Aulander for transportation to Norfolk, which car was not supplied with food and water, and that in conveying the said calves between the points above mentioned the defendant knowingly and willfully kept the same continuously confined in said car for a period longer than twenty-eight consecutive hours, to-wit, for fifty consecutive hours, without unloading them in a humane manner into properly equipped pens for rest, water, and feeding.

The defendant pleaded *nil debit*, upon which plea issue was joined, and thereupon the parties filed a written stipulation waiving a jury and submitting the whole matter of law and fact to the court.

The following is the agreed statement of facts upon which this case was determined by the lower court:

"On April 15th, 1907, Conductor E. L. Hollingsworth, on North-bound Local Freight Train, carrying cars known as 'pedlers,' used for picking up freight at various stations en route, at Aulander, N. C., loaded on one of these pedler cars three calves crated, consigned to Mr. C. R. Robinson, Norfolk, which were duly entered on way-bill, copy of which is hereto attached, and at the same time he received from the agent at Aulander, a conductor's live stock report, form 265, copy of which with blanks unfilled is hereto attached for illustration, upon which were entered the notations as indicated on the way-bill. This train had a small engine and was overloaded with cars and the conductor was directed to leave five or six of the cars at Ahoskie with the way-bill for the same, to be picked up by a following through freight train. The conductor did not examine the bill upon which the calves were noted, and when he left the car containing the same at Ahoskie, to be picked up by a later through freight train, he failed to call the agent's attention to the fact that it contained these calves. For this reason the car was not forwarded promptly and arrived at Pinners Point on the night of April 16th, and there being no facilities for the delivery of live stock at night to the Union Stock Yards in Berkeley, the parties to whom delivery was to be made, they were delivered to the consignee on the 17th inst.

"The company has rules which are delivered to train masters, yard masters, station agents, conductors, and others concerned in the transportation of live stock, and posted in the bulletin books at designated points, which conductors are required to read and sign, the latter to inform the train master that they have read the circular, which prohibits the carrying of live stock for more than twenty-eight consecutive hours without being within that period fed and watered, copy of circular hereto attached.

"In addition to this circular, the company has a rule which station agents and conductors are required to obey, that upon the shipment of live stock, telegraphic notice is sent to the superintendent of the district over which the shipment moves, who in turn is required to notify the station of destination. These rules are rigidly enforced, and a violation of them when brought to the attention of the proper official is followed by suspension or dismissal as the gravity of the case may require.

"In this particular case, the offending conductor, Hollingsworth, made a statement, copy of which is hereto attached, admitting his fault in not obeying the rules of the company, and he was promptly discharged from the service of the company for this and other violations of the rules, before the institution of this suit.

"The calves were not unloaded for rest, water, and feeding between the time they were loaded at Aulander, on the 15th of April, 1907, at 10:30 o'clock A. M., and their arrival at Pinnars Point, and were not unloaded until the 17th of April, they having been kept continuously confined in the car and in the crate in which they were shipped during the time just stated."

PRITCHARD, *Circuit Judge*.

The statute under which this action was instituted is entitled "An Act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia," etc.

Thus it will be seen that the purpose of the statute is to prevent any common carrier engaged in transporting interstate commerce from confining cattle, sheep, swine, or other animals in cars, boats, or vessels for a longer period than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, "unless prevented by storm or other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight."

The enactment of this law does great credit to our lawmakers, and it should be construed in the spirit in which it is written.

Human instinct forbids that we should cruelly treat or otherwise abuse dumb animals. It is true that, by virtue of Divine authority, they are under the dominion and control of man, yet we are taught from the same source that we should use all means in our power to prevent them from being subjected to unusual or cruel treatment. It was undoubtedly the purpose of Congress in the enactment of this law to make ample provisions for the protection of animals while being transported by interstate carriers.

According to the greater weight of authority, a suit of this character is treated as being a civil proceeding. In the case of *Atcheson v. Ewart*, 1 Cow., 389, 391, which was an action to recover statutory penalty, Lord Mansfield said that "penal action is as much a civil action as an action for money had and received;" also in the case of *Jacob v. United States*, 1st Brock, 520, 525, Chief Justice Marshall, in discussing this phase of the question said that "such an action is a 'civil cause' under the Ninth Section of the Judiciary Act of 1789 defining the jurisdiction of the District Courts."

The principal question to be determined is as to whether the defendant company "knowingly" and "willfully," within the meaning of the statute, kept the calves in question continuously confined in the car in which they were loaded, as stated in the declaration, for a period longer than twenty-eight consecutive hours, without unloading them for rest, water, and feeding.

The duty enjoined upon the company by the statute is plain and explicit, and as to its true meaning there can be no doubt. The only instance wherein the company is released from performing this duty is "when prevented by storm or other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight."

The proper construction of the foregoing provision must necessarily determine the question involved in this controversy. It is insisted by counsel for plaintiff in error that this is a penal statute, and that it was passed in the interest of the public, imposing upon the company a penalty as a punishment for doing a prohibited act; and that the words "knowingly" and "willfully" import an evil intent, and, therefore, in order to sustain a verdict in favor of the plaintiff, it must appear that the act complained of was knowingly and willfully committed in the sense in which these words are used where one is charged with a criminal offense. It has been decided a number of times that the statute in question is not a criminal one, and that it should not be construed according to the strict rules by which courts are governed in criminal cases.

In the case of *Armour Packing Co. v. U. S.*, 153 Fed., 1, it was held:

"But no evil intent is essential to an offense which is merely *malum prohibitum*. The simple purpose to which the act forbidden, in violation of the statute, is the only criminal intent requisite to the conviction of a statutory offense which is not *malum in se*. Bishop on Statutory Crimes, Sec. 596b; 1 Bishop's Criminal Law, 8th Ed., Secs. 343, 345, Part IV."

This case was finally carried to the Supreme Court of the United States, 209 U. S., 85. That court, in passing upon this point, said:

"While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls, where purposely doing a thing prohibited by statute may amount to an offense, and that the act does not involve moral turpitude or moral wrong."

In the case of *N. Y. Cent. & H. R. R. Co. v. U. S.*, 165 Fed., 833, the Circuit Court of Appeals for the First Circuit, in passing upon this question, said:

"The word 'wilfully' is sometimes used in statutes and indictments, and sometimes omitted from them, for very different reasons. In order

that there shall be a punishable evil intent, the criminal law ordinarily requires that there shall be a knowledge of facts, and when with a knowledge of the facts is combined an injurious result which the actor foresaw, or might reasonably have foreseen, all the law ordinarily implies by the word 'wilfully' is accomplished."

In the case of the *United States of America v. Union Pacific Railroad Company*, decided January 15th, 1909, the Circuit Court of Appeals for the Eighth Circuit, in referring to a suit of this character, said:

"The defendant denies that its failure to unload the said live stock in accordance with the law was in any way *wilful* or from unavoidable cause which could have been anticipated by the exercise of due diligence and foresight, but, on the contrary, avers that the said failure was *wholly* caused by the great and unusual press of business, both on the tracks of the defendant and its stock yards, causing delays at the meeting points of its trains, and failures of its engines, both those carrying the cars aforesaid and those drawing other trains which affected and delayed the train carrying the said live stock and *alone* caused the said live stock to be confined beyond the time limited by law.

"Counsel for defendant contend that the word 'wilfully' as employed in the statute necessarily implies an evil purpose or bad motive and have in their brief collected and reviewed many cases dealing with this word. We find no occasion, however, to follow them through this maze of authority. The word is here employed in connection, not with a crime, or offense *malum in se*, but with an offense purely statutory subjecting the offender to a civil action only. In view of our former rulings on this question we are of opinion, and so hold, that as here employed the word means only the intentional doing of an act forbidden by the statute."

* * * * *

"* * * To hold that some evil purpose or bad motive must be shown in order to constitute a cause of action under section 3 of the act of June 29, 1906, would, in our opinion, thwart the obvious purpose of the legislation. It can hardly be conceived that any reputable carrier would deliberately and designedly, because of ill will or other malevolent feelings towards the dumb animals or their owners, fail to conform to the reasonable and humane requirements of the law. If the law be operative only to restrain the possible exercise of such evil and perverse disposition it would have little, if any, scope of operation."

As appears from the agreed statement of facts, Conductor Hollingsworth, on a freight train carrying cars known as "pedlers," used in picking up freight at various stations en route, at Aulander, N. C., loaded on one of these cars, three calves, crated, consigned to Mr. C. R. Robinson, at Norfolk. It also appears that the shipment was duly noted on the way-bill, and that the conductor received from the agent at Aulander a conductor's live stock report, Form 265, upon which was entered the notations as indicated on the waybill. It appears from the testimony of the conductor that the train had a small engine, and, being consequently overloaded with cars, he was directed to leave five or six of the cars at Ahoskie, with the waybills for the same. It also

It appears that the conductor did not examine the waybill upon which the calves were noted, and, when he left the car at Ahoskie, he failed to call the attention of the defendant's agent at that place to the fact that it contained the calves in question; that owing to his failure to do so, the car was not promptly forwarded and delivered, and that the car containing the calves did not reach Pinners Point until the 17th day of April, two days after their shipment, and were kept confined continuously during that time in the car in which they had been loaded at Aulander until the day on which they were delivered at Pinners Point. It also appears that the calves were not unloaded for rest, water, and feeding between the time they were loaded at Aulander and the time they were unloaded at Pinners Point.

It is true that the defendant company, by its rules, which are delivered to train masters, yard masters, station agents, conductors, and others employed in the transportation of live stock (and which conductors are required to read, sign, and to inform the trainmaster that they have read the circular), prohibits the carrying of live stock for more than twenty-eight hours without being, within that period, properly fed and watered. It also appears from the statement of facts that the company has a rule to the effect that upon the shipment of live stock telegraphic notice is sent to the superintendent of the district over which the shipment moves, and who, in turn, is required to notify the station of destination; that these rules are rigidly enforced and in case there is a violation of them, the party thus offending is suspended or dismissed, as the gravity of the case may require. Conductors and station agents are required to obey this rule. It also appears that the conductor in this instance admitted that he did not obey the rules of the company, and it further appears that he was discharged from the service of the company for this and other violations of the rules before the institution of this suit.

That the failure of the conductor to examine the waybill upon which the calves were noted, and his failure to call the attention of the defendant's agent at Ahoskie to the fact that it contained these calves, was inexcusable negligence on his part, can not be denied. But it is insisted by defendant below that inasmuch as the company took the precautions hereinbefore mentioned to insure a strict compliance with the law on the part of its conductors, agents, and other persons, such action on its part is sufficient to relieve the company from liability, notwithstanding its agent, the conductor, wholly neglected to perform the duties enjoined upon the company by the statute. And the question naturally arises as to whether this is a valid defense under the statute. It is well settled that a corporation can only act through its agents, and such being the case, it necessarily follows that a lack of foresight and due diligence on the part of those acting as agents in complying with the statute is negligence. Therefore, in this instance, we think the corporation has,

within the meaning of the statute, “knowingly” and “willfully” failed to comply with the law, notwithstanding the fact that there may have been no evil motive or intent in the transaction. In other words, we think a negligent failure to comply with the law, with a knowledge of facts as shown in this instance, is willful failure.

The case of *Montana Central Railway v. U. S.*, 164 Fed., 400, involved a shipment of horses, and the answer filed therein averred, among other things, that long prior to the time the shipment in question was made, the defendant company, by printed circulars and otherwise, addressed to its agents, notified them of the conditions and requirements of the act, and also stated to them that they were required to conform strictly with the requirements of the same; and that afterward a circular was issued addressed to all agents, yard masters, and others in the employ of the company, again requiring of them strict compliance with the law; and that both of these circulars were duly posted. It was further averred that the failure to unload the horses for rest, water, feeding, etc., was due to the forgetfulness and unintentional neglect of its train despatchers at Great Falls, etc. This case was heard by the Circuit Court of Appeals for the Ninth Circuit, and, in disposing of the contention of the defendant to the effect that, inasmuch as it had taken the pains to advise its agents and other employees as to the provisions of the statute, and had also compelled all such persons to conform strictly to the instructions contained in the circulars for the observance of the act, Judge Ross said:

“The sole defense is that the statute imposes the penalty only on the carrier who ‘knowingly’ and ‘wilfully’ fails to comply with its provisions; and it is earnestly contended for the plaintiff in error that the company here did not ‘knowingly’ and ‘wilfully’ confine the horses for the time and under the circumstances stated. Its counsel insists that the case if not a criminal one, is at least of a criminal nature, and that to it should be applied the same strict rules of construction and of evidence which are applied in criminal prosecutions. In that contention he is supported by the cases of the *United States v. Louisville & N. R. R. Co.* (D. C.), 157 Fed., 979, and the *United States v. Illinois Central Railroad Company* (D. C.), 156 Fed., 182. But we are unable to take that view of the matter. We do not understand the statute to make a violation of its provisions a crime. It is true that a penalty is imposed for its violation, but the penalty is a pecuniary one only, which Congress expressly provided shall be recovered by civil action in the name of the United States, having, as we think, the ordinary incidents of a civil action. This view is in accord with that taken of the same and of a similar statute in the case of the *United States v. Southern Pacific Railroad Company* (D. C.) 157 Fed., 459, *United States v. Central of Georgia Railway Company* (D. C.), 157 Fed., 895, *United States v. Philadelphia & Reading Railway Company*, 160 Fed., 696, and the *United States v. Baltimore and Ohio S. W. R. R. Co.* (C. C. A.), 159 Fed., 33.

“The company, being a corporation, could, of course, only act through agents, and its answer expressly alleges that the horses in

question were confined on its cars in violation of its statutes by reason of the oversight, forgetfulness, and unintentional neglect of its train despatchers. As was held by the court below, we think the facts as expressly alleged in the answer negative the claim that the failure to rest, feed, and water the horses was not the result of knowledge and wilfulness on the part of the company. It knew through its agents and through them only could know, that the horses were loaded on its cars, when their transportation commenced, where it should rest, water, and feed them as required by the statute, instead of doing which, through its agents, continued to carry them in its cars longer than the statutory period of 28 hours without rest, feed, or water. When the company did this, according to its own averments, by and through the only means it transported or could transport them, at all, namely, its agents, we do not think that it can be heard to say that it did not do so 'knowingly and wilfully.'"

It cannot be reasonably contended that the failure of the company in this instance to unload the calves "in a humane manner into properly equipped pens for rest, water, and feeding," was due to "storm or other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due care and foresight." It was admitted by the conductor that he neglected to examine the waybill upon which the calves were noted, either before or at the time he left the car containing the same at Ahoskie. This was clearly negligence on his part and on account of which he was very properly removed by the company. The negligence of the conductor in this respect was the negligence of the company, and clearly renders the corporation liable under this statute.

If the publication of circulars, as well as rules, delivered to train masters, yard masters, station agents, and others concerned in the transportation of live stock, and posted on bulletin boards at designated points, which conductors are required to read and sign (and the latter to inform the trainmaster that they have read the circulars), which prohibits the carrying of live stock for more than twenty-eight hours without being within that period properly fed and watered is sufficient to relieve the company from liability for the acts of its servants and agents, the corporation would thus be enabled to practically nullify the statute and render its provisions nugatory. The defendant bases its defense upon the ground that a corporation can, in advance, by the publication of letters, circulars, and otherwise, as to the duties to be performed by its servants, agents, etc., place itself in a position where, notwithstanding the fact that its agents may violate the law with impunity, nevertheless the corporation can not be reached by the statute which was passed for the express purpose of requiring at its hands the performance of a duty which is imperative and can not be avoided, except as hereinbefore stated. A simple statement of the proposition clearly shows the fallacy of the theory as a defense, in this instance relied upon by the defendant.

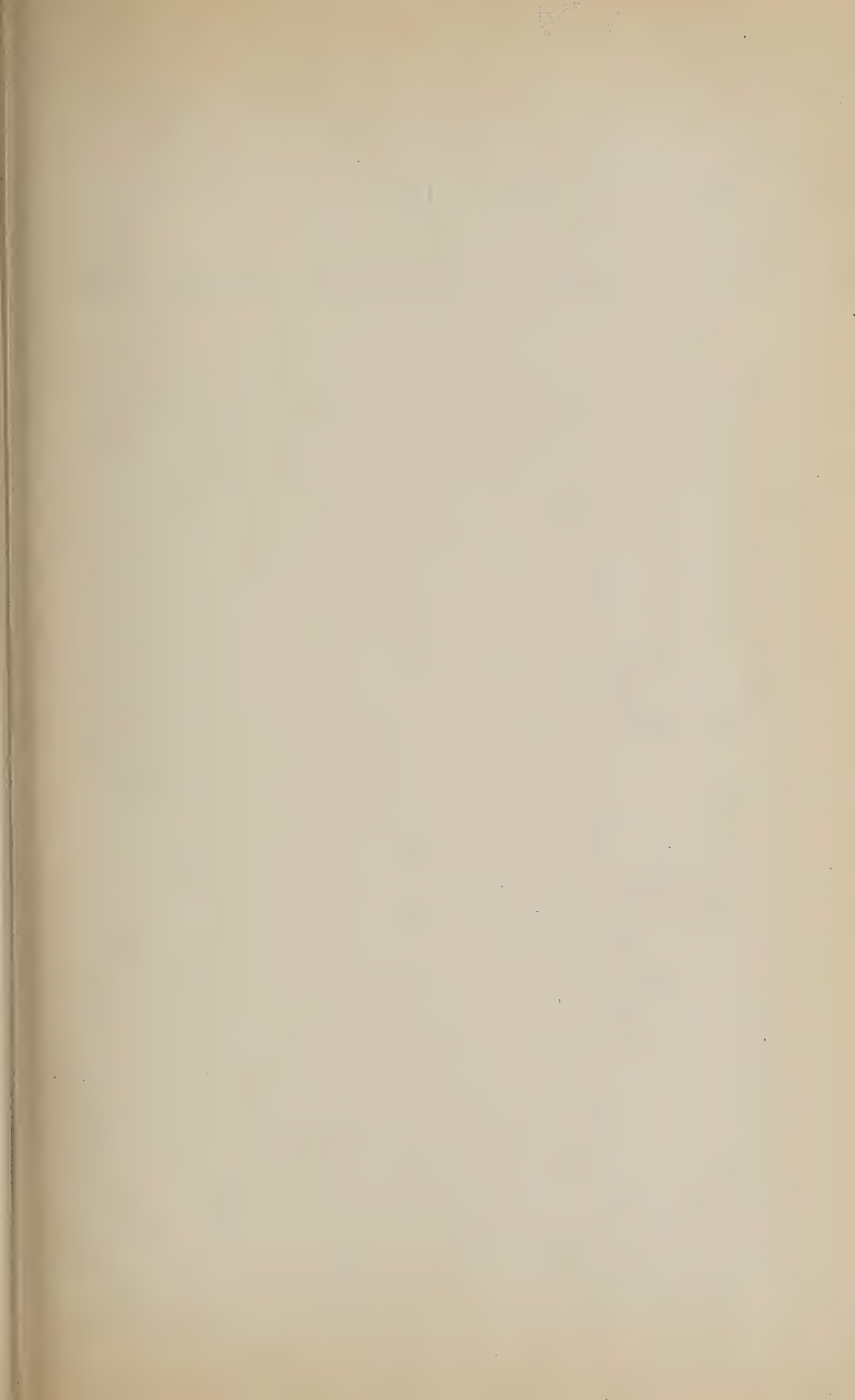
We have carefully considered the various cases cited by counsel for defendant in support of their contention, but we do not think that we are governed by the rule laid down in these cases in the consideration of this controversy.

It follows from what we have said that the judgment of the court below must be reversed. Inasmuch as this case was tried wholly upon an agreed statement of facts we would, if the sum recoverable by the United States were definitely fixed by the statute, direct the entry of a judgment therefor; but, inasmuch as section 3, Act of June 29, 1906, prescribes a penalty of not less than one hundred nor more than five hundred dollars for a violation of its provisions, there is here matter of discretion to be exercised by the trial court, and the course followed in *Rathbone v. Board of Commrs.*, 83 Fed., 125, by the Circuit Court of Appeals for the Eighth Circuit is not here applicable.

The judgment of the court below is therefore reversed and the case will be remanded for further proceedings in accordance with the views herein expressed.

Reversed.

O



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 22.

GEO. P. McCABE, Solicitor.

LIBRARY

RECEIVED

AUG 25 1909

JUDICIAL NOTICE OF THE REGULATIONS OF THE U. S. DEPARTMENT OF AGRICULTURE. U. S. Department of Agriculture.

The Department is receiving a number of requests for certified copies of rules and regulations promulgated by the Secretary of Agriculture under authority of the several acts of Congress intrusted to him for enforcement, reference being usually made to Section 882 of the Revised Statutes of the United States. A careful examination of controlling decisions has confirmed the previous opinion that federal courts may and should, as a matter of established practice, take judicial notice of such regulations, so that it is needless for the Department to prepare certified copies of them. Under the circumstances, it has been deemed proper to issue this circular, calling attention to the apparent misconception which has obtained, and citing leading cases on the general subject of judicial notice of departmental regulations, issued under authority of a statute, with particular reference to notice of such regulations of the Department of Agriculture.

“The true conception of what is judicially known,” says Professor Thayer, *Cas. Ev.*, 20, “is that of something which is not, or rather, need not, unless the tribunal wishes it, be the subject of either evidence or argument—something which is already in the court’s possession, or, at any rate, is so accessible that there is no occasion to use any means to make the court aware of it.” Where they have thought proper to do so, courts have assigned various reasons for the exercise of their ancient judicial function in taking judicial notice of departmental regulations without formal proof. Sometimes it is said that, being authorized by an act of Congress, such regulations may logically be considered part of the act (*United States v. Dastervignes*, 118 Fed., 199; same, 122 Fed., 31); or, what amounts to the same thing, since the regulations are issued under the authority of a statute, they have the force and effect of law (*United States v. Eaton*, 144 U. S., 677, 688), and, it might be said, consequently, that they are entitled to the same consideration as a statute as regards judicial notice. An equally convincing reason may be found in the history of common law procedure. The recognition of executive acts is, of course, one of the oldest functions of the judge, and survives to-day from the time when “the King, long ago, sat personally in court,” and “it was an obvious and easily intel-

ligible thing that courts should notice without evidence whatever the King himself knew or did.” (8 Harv., Law Rev., 302; *Partridge v. Strange*, Plow., 77, 83-84.) Regulations of the executive departments of the Federal Government, issued to carry out statutes, may properly be considered the acts of the Executive, whose orders are judicially noticed by all Federal courts (*Eliason v. United States*, 16 Pet., 291, 302; *Apis v. United States*, 88 Fed., 931, 933), and who may be said to correspond, in this respect, to the king at common law.

The federal court of last resort has laid it down as a broad, general rule of practice that departmental regulations should be judicially noticed, where they are issued regarding matters in which the public has an interest, in which they have a right to participate, and by which they are to be controlled. In *Caha v. United States*, 152 United States, 211, 221, the Supreme Court, speaking through Mr. Justice Brewer, said:

“The rules and regulations prescribed by the Interior Department in respect to contests before the Land Office, were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of Congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice. Without attempting to notice all the cases bearing upon the general question of judicial notice, we may refer to the following: *United States v. Teschmaker*, 22 How., 392, 405; *Romero v. United States*, 1 Wall., 721; *Armstrong v. United States*, 13 Wall., 154; *Jones v. United States*, 137 U. S., 202; *Knight v. United States Land Association*, 142 U. S., 161, 169; *Jenkins v. Collard*, 145 U. S., 546.”

The wide range of reference and allusion by other courts to the principle enunciated in this quotation has given *Caha v. United States* an established position as a leading case on the subject of judicial notice of departmental regulations. So broad is the proposition there laid down, that courts have been content with a mere reference to the case in subsequent decisions, and no case has been found where any attempt has been made to question it or to limit its application. In *Cosmos v. Gray Eagle*, 190 U. S., 301, 309, it is said that—

“Courts will take judicial notice of the rules and regulations made by the Land Department regarding the sale or exchange of public land. *Caha v. United States*, 152 U. S., 211, 221.”

In *Sprinkle v. United States*, 141 Fed., 811, 820, the court said, speaking of rules promulgated by the Commissioner of Internal Revenue:

“* * * there was no error in their admission as evidence, though there was no necessity for their formal introduction, they being matters of which the courts of the United States take judicial notice. This was expressly decided by the Supreme Court in passing on the necessity of the introduction of certain rules and regulations of the Interior Department in *Caha v. United States*, 152 U. S., 212, 14 Sup. Ct., 513, 38 L. Ed., 353; * * *.”

In commenting on the language quoted from the *Caha* case, the Circuit Court of Appeals said in *Nurnberger v. United States*, 156 Fed., 721, 730:

“It is observable that in the statement of Mr. Justice Brewer, *supra*, he did not say that such a regulation from the department could not formally be introduced in evidence, but that even without such formal presentation the court should take judicial notice thereof.”

Speaking of regulations made by the Secretary of War, under the act of August 18, 1894 (28 Stat., 362), regarding the use of canals, and referring to the *Caha* case, the court said in *United States v. Moody*, 164 Fed., 269, 275:

“Regulations made by an executive department, in pursuance of authority delegated by Congress, have the force of law, and the courts take judicial notice of their existence and provisions. It is, therefore, unnecessary to set out the rule alleged to be violated, either in terms or by number. *Wilkins v. United States*, 96 Fed., 837.”

In *Grady v. United States*, 98 Fed., 238, 239, a suit upon a postmaster's bond, the court said:

“Postal regulations are promulgated by the Postmaster-General under authority of an act of Congress and have the force of law, of which the courts must take judicial notice. *Caha v. United States*, 152 U. S., 211.”

In *United States v. Flournoy Live Stock Real Estate Co.*, 71 Fed., 576, 578, a suit by the United States to remove the defendant from land alleged to be held under leases improperly obtained from the Indians, the court said:

“The courts of the United States take judicial notice not only of the public acts of Congress and of the legislatures of the several States of the Union, but also of the rules and regulations prescribed by the several departments for the transaction of the public business. *Caha v. United States*, 152 U. S., 211, 14 Sup. Ct., 513.”

In *King v. McAndrews*, 104 Fed., 430, 438, the court said:

“This court will take judicial notice of the rules and regulations of the Land Department of the United States in regard to the disposal of public lands. *Caha v. U. S.*, 152 U. S., 211.”

To the same effect is *Prather v. United States*, 9 D. C. Appeals, where the regulations of the Commissioner of Internal Revenue regarding renovated butter were judicially noticed upon the authority of the *Caha* case.

An attempt was made in *United States v. Bedgood*, 49 Fed., 54, 58, to secure a conviction for perjury on the ground that the defendant had made a false oath in a preemption certificate. In sustaining a demurrer to the indictment, the court was called upon to consider the familiar question as to the power of the General Land Office to prescribe rules the violation of which may be punished as a crime. District Judge Toulmin declined to take judicial notice of regulations issued by the Commissioner of the General Land Office, regarding the public land, with the approval of the Secretary of the Interior, though section 2478, R. S., authorized their promulgation. It should be noted, however, that the court declined to decide that the Secretary of the Interior had authority to issue the regulation under which the case was brought; therefore, logically, it could not be expected to take judicial notice of the regulation. Even if the case be taken as an authority against the proposition that federal courts should take judicial notice of regulations issued under authority of an act of Congress, it is an early case, and its effect is seriously weakened and probably destroyed by the *Caha* case, which was decided two years later by the Supreme Court.

In *United States v. Slater*, 123 Fed., 115, 121, the court took judicial notice of the rules and regulations issued by the Secretary of Agriculture, under the act of May 29, 1884, 23 Stat., 31, saying:

"It is argued that the informations as to the second count are insufficient, because they do not set out the particular rules and regulations of the department with reference to the subject matter of the informations. It might be the better practice so to do, or at least to make such reference to the particular rule or regulation relied upon as would notify the defendants of the particular charge against them. But the question suggested and discussed, that the court could not take judicial notice of such rules and regulations, has been determined adversely to the contentions of defendant's counsel. *Caha v. United States*, 152 U. S., 211, 221, 14 Sup. Ct., 513, 38 L. Ed. 415, and authorities there cited."

In *United States v. Louisville & Nashville R. R. Co.*, 165 Fed., 936, the court took judicial notice of the regulations issued by the Secretary of Agriculture, under the act of March 3, 1905 (33 Stat., 1264), saying:

"True, if the regulations were duly and legally made and promulgated, the court would take judicial notice of their contents and provisions. *Caha v. United States*, 152, U. S., 221, 222."

State courts have frequently recognized, without proof, regulations issued by the executive departments of the federal Government. So in *Larson v. First National Bank* (Nebr.), 92 N. W., 729, the regulations of the Indian Bureau of the Interior Department were

judicially noticed; in *United States v. Gumm*, 9 N. M., 611, 58 Pac., 398, the regulations issued by the Interior Department regarding the cutting of timber were judicially noticed, and in *Whitney v. Spratt*, 25 Wash., 62, 64 Pac., 919, similar notice was taken of the rules and decisions of the Land Office. Also in *Low v. Hanson*, 72 Me., 104, the court noticed, without proof, the rules of the Treasury Department relating to arrears of pay due to deceased officers in the Navy. See also *Denver & Rio Grande Ry. Co. v. United States*, (N. M.), 54 Pac., 336; *Carr v. First National Bank* (Ind. App.), 73 N. E., 947, *Pierce v. Kimball*, 9 Me., 154; *United States v. Williams*, 6 Mont., 379, where the court took judicial notice of the regulations of the Secretary of the Interior regarding cutting timber on the public domain, and *Campbell v. Wood*, 116 Mo., 196, 202, 22 S. W., 796, where the instructions issued to deputies by the Federal Surveyor-General's Office were judicially noticed. In *Wabash R. R. Co. v. Campbell*, 219 Ill., 313, 3 L. R. A., N. S., 1092, 1097, the court specifically states that the orders issued by the Secretary of Agriculture under the act of March 3, 1905 (33 Stat., 1264), in regard to the handling of live stock from an area quarantined for disease, will be judicially noticed.

It is clear from the decisions already cited that federal courts may properly take judicial notice not only of the fact that the Secretary of Agriculture has issued certain regulations, under a given statute, but also of the substance and provisions of such regulations. While this is undoubtedly true in theory and as a principle of federal practice, yet as a matter of fact it may often happen that a judge is not personally familiar with a particular regulation and has no means of getting a copy unless counsel furnish it. The Circuit Court of Appeals for the Second Circuit has expressed itself in no uncertain terms on this point. The court said in *Nagle v. United States*, 145 Fed., 302:

"Where there is some question of statute law, where the court can itself by reference to books with which it is familiar, and which each judge possesses, determine just what statutory provisions were in force at a given date, there is no necessity for incumbering the record with them. But it is different with departmental regulations. No department ever sends its compilation of regulations to the judges. They are frequently amended, and without special information from the department no one can tell whether a particular regulation in some printed compilation was in force a year later. It is grossly unfair to a trial judge to cite some regulation upon a brief on appeal which was not laid before him on the trial. We have no doubt that it is far better practice to read any special regulations which may be relied upon into the record before the trial court. It is a hopeless task for an appellate court to determine what such regulations were at any particular time. It must either accept counsel's statement or itself make inquiry of the particular department, neither of which practices is to be commended. It is to be hoped that upon the new trial the various regulations bearing upon the questions presented by the case may be specifically referred to."

This was a suit upon a postmaster's bond to recover money alleged to have been illegally paid out by him, and involved certain regulations of the Post-Office Department.

Indeed, in *School District v. Insurance Company*, 101 U. S., 472, the Supreme Court, speaking through Chief Justice Waite, said :

"We must insist on a strict observance by counsel of all rules intended to facilitate our examination of causes, especially those submitted. Although in general the statutes of the States are to be found in the Congressional Library, we do not have them at our rooms, where necessarily cases are investigated. A little trouble on the part of counsel in obeying this particular rule will expedite materially our labors."

This case involved the examination of several statutes of Nebraska, and because the acts were not printed in the briefs, the submission of the case was set aside and the cause restored to its original place on the docket.

In *Wilkins v. United States*, 96 Fed., 837, 840, a violation of the Oleomargarine Act of August 2, 1886, under which the Commissioner of Internal Revenue was authorized to issue regulations, after reviewing *United States v. Eaton*, 144 U. S., 688, and *Caha v. United States*, 152 U. S., 211, the court said :

"While the careful pleader, out of abundance of caution, might specifically recite such regulations, as we find from an examination of the indictment was done in *U. S. v. Ford*, 50 Fed., 467, yet the omission to plead that of which the courts take judicial notice should not render the indictment so meaningless as to justify the present ground of demurrer, viz., that the same did not state facts sufficient to constitute an offense against the United States."

From an examination of the decisions, it would appear that, while federal courts ought to take judicial notice of regulations of the Secretary of Agriculture, issued under authority of statutes intrusted to him for enforcement, and intended to carry such statutes into effect, still, as a matter of fairness to the court, and to the defendant, too, the regulations involved should be set out, or identified by proper reference. The quotation or reference would not be by way of proof, but merely for the convenience of the court. As was said by Baron Parke, in *Frost's Trial*, Gurney's Rep., 168, to counsel :

"For the future, it would save time, if, when you founded an objection upon an act of Parliament, you had the act here; for, though we are supposed to keep the statutes in our heads, we do not."

When requests for certified copies of regulations of the Department of Agriculture are made, as has been stated, correspondents usually refer to Section 882, R. S. This section reads as follows :

"Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."

Regulations issued under authority of a statute would be included, if at all, only within the class of records, as stated in the section referred to, but when the rest of the section is considered it will be seen that, even apart from the decisions already referred to, the section was not intended to establish a customary medium of proof for departmental regulations. Clearly, it is in the technical sense that the word "evidence" is used in the phrase "admitted in evidence" as it appears in the section. Submitting a copy of a departmental regulation is not producing evidence in any legal or proper sense; it is rather referring the court, for its convenience, to a fact which, theoretically, it is presumed to know, but which, actually, it may not be acquainted with at the time. As said by Justice Baldwin, in *Connecticut v. Main*, 69 Conn., 123, 36 L. R. A., 623, 627:

"Judicial notice takes the place of proof and is of equal force. As a means of establishing facts, it is, therefore, superior to evidence. In its appropriate field it displaces evidence, since, as it stands for proof, it fulfils the object which evidence is designed to fulfil, and makes evidence unnecessary. *Brown v. Piper*, 91 U. S., 37, 43, 23 L. Ed. 200, 202. * * * If, in regard to any subject of judicial notice, the court should permit documents to be referred to or testimony introduced, it would not be, in any proper sense, the admission of evidence, but simply a resort to a convenient means of refreshing the memory or making the trior aware of that of which everybody ought to be aware. *State v. Morris*, 47 Conn., 179, 180."

The statutes intrusted to the Secretary of Agriculture for enforcement, which expressly authorize him to make regulations for their enforcement, are as follows:

Section 3 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768), authorizes the Secretary of Agriculture, the Secretary of the Treasury, and the Secretary of Commerce and Labor to issue regulations for carrying out the act.

Section 1 of the act of August 3, 1890 (26 Stat., 414), authorizes the Secretary of Agriculture to issue regulations regarding marking salt pork and bacon for export. Section 7 of the same act authorizes the Secretary to issue regulations for the quarantine of imported live stock at designated ports; section 10 authorizes him to issue regulations regarding the handling of animals for export or which are imported.

Section 3 of the act of March 3, 1891 (25 Stat., 1089), authorizes the Secretary to issue regulations for the post-mortem examination of carcasses of live stock slaughtered and prepared for human consumption, which are the subjects of interstate commerce.

Section 1 of the act of February 2, 1903 (32 Stat., 791), authorizes the Secretary to issue regulations for the suppression of contagious and infectious diseases of live stock.

Section 3 of the act of March 3, 1905 (34 Stat., 1264), authorizes the Secretary to issue regulations for quarantining areas where contagious

diseases of live stock exist and for the handling of live stock coming from such areas.

Section 1 of the act of March 3, 1891 (26 Stat., 833), authorizes the Secretary to issue regulations for the safe transport and humane treatment of cattle for export.

Paragraph 1 of the act of June 30, 1906 (34 Stat., 669), authorizes the Secretary to issue regulations governing the shipment, in interstate and foreign commerce, of meat and meat food products.

Section 3 of the act of March 3, 1905 (33 Stat., 1269), authorizes the Secretary to issue regulations governing the shipment, in interstate commerce, of insects intended for scientific purposes.

By section 5 of the act of May 9, 1902 (32 Stat., 196), the Secretary of Agriculture is authorized to make regulations for carrying that act into effect. The act provides for the inspection of factories where renovated butter is made and for the marking of packages of renovated butter.

The act of June 4, 1897 (30 Stat., 35), and the act of February 15, 1901 (31 Stat., 790), as amended by the act of February 1, 1905 (33 Stat., 628), authorize the Secretary of Agriculture to make rules and regulations regarding the use of the forest reserves.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 23.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Ninth Circuit, affirming the decision of the District Court for the Northern District of California, in a case involving violation of the Twenty-eight Hour Law (Act of June 29, 1906, 34 Stat. 607).

SYLLABUS.¹

1. The Twenty-eight Hour Law is not unconstitutional, as delegating legislative power to the shipper or owner of live stock, in permitting him to extend the time of confinement to thirty-six hours.

2. Although the Twenty-eight Hour Law is incidentally a protection to owners of live stock, its primary and important purpose is to prevent cruelty to animals in transit.

3. The Twenty-eight Hour Law is not incomplete in providing a penalty for confining live stock longer than twenty-eight hours, but permitting the shipper to extend the time of confinement to thirty-six hours.

4. The Twenty-eight Hour Law is not void for uncertainty in the second proviso of section 1, the meaning of which is that if the twenty-eight hour limit expires in the night, in the case of sheep, transit may be continued to a suitable place for unloading, without the request of the owner or custodian, but that in no case shall the limit of thirty-six hours be exceeded.

5. The unit of violation under the Twenty-eight Hour Law is the shipment, not the carload.

CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

SOUTHERN PAC. CO.	}	No. 1672.
v.		
UNITED STATES.		

In error to the District Court of the United States for the Northern District of California. (171 Fed. 360.)

Decided July 6, 1909.

For opinion below, see 162 Fed. 412.

The defendant in error filed its complaint against the plaintiff in error, a common carrier and lessee of railroads and lines of roads, alleging that on August 30, 1906, at Reno, Nev., the plaintiff in error received a consignment of sheep, consigned by T. Fallon to the Western Meat Company, of South San Francisco, Cal.; that after loading the sheep

¹ Not by the court.

at Reno, and while transporting the same to South San Francisco, and until unloading was commenced at that place, the plaintiff in error did knowingly and willfully confine said sheep in said cars for more than thirty-six consecutive hours as per request attached, namely, for thirty-eight hours and forty-five minutes, without unloading them for rest, water, and feed; that the plaintiff in error was not prevented by storm, or unavoidable cause or accident which could not have been anticipated or avoided by the exercise of due diligence and foresight, from unloading said sheep for rest, water, and feeding during their said conveyance; and that the cars were not such in which the sheep could have sufficient feed, water, space, and opportunity to rest. The plaintiff in error filed a plea in abatement alleging that at the time of the commencement of the action there had been commenced, and were pending in the same court, between the same parties, three other actions for the same cause of action alleged in the complaint in this cause, and that this action constitutes the splitting of a single cause of action. A demurrer to the plea was sustained, and the plaintiff in error answered, alleging that it was not guilty of any violation of said act, and did not knowingly or willfully confine said sheep for a longer period than thirty-six hours; that there was a written request for an extension to thirty-six hours, but that the time expired in the nighttime; and that the sheep were continued in transit to a suitable place for unloading, and were delivered before the expiration of said thirty-six hours to the owner and consignee. The answer alleged, also, the commencement and pendency of the three other actions referred to in the plea in abatement. On the trial it was shown that the plaintiff in error completed the loading of the four separate consignments of sheep referred to in the plea in abatement into its railroad cars at Reno, Nev., on August 30, 1906, at 10.45 a. m., and that the cars containing the same were made up into one train, and as one train the same were conveyed over its road, and that the unloading commenced at South San Francisco on September 1, 1906, at 1.30 a. m., thirty-eight hours and forty-five minutes after the loading was completed. The plaintiff in error introduced evidence tending to show that, when the train and cars containing the sheep were started, it was honestly believed and reasonably anticipated that the sheep would not be confined in the cars for a period longer than that permitted by law.

C. W. Durbrow and Knight & Heggerty, plaintiff in error.

Robt. T. Devlin, U. S. Atty., and Alfred P. Black, Asst. U. S. Atty.
Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The plaintiff in error contends that Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), under which the judgment was rendered in this case, is unconstitutional, for the reason that it delegates legislative power to the owner or custodian of stock shipped or in transit, whereby, although the act itself makes it unlawful and inflicts a penalty for confining animals in the cars for a longer time than twenty-eight hours, the power is delegated to the owner or person in custody of the shipment to extend the time by a written request that they be confined thirty-six hours, leaving it to the will or caprice of the owner or person in custody of animals to say whether the carrier thereof

shall or shall not comply with the provisions of the act. A law must be complete in all its terms when it leaves the legislature. But, while a legislature may not delegate the power to legislate, it may delegate the power to determine some fact on which the operation of its own act is made to depend. Although the act in question herein incidentally protects the owners of live stock, its primary and important purpose is to prevent cruelty to animals in transportation. It needs no argument to show how great is the evil which it is intended to remedy. We find no ground for saying that the law as framed by Congress is not complete in itself. No part of it is made by the shipper, nor is he given the option to say that the carrier shall not comply with its provisions. The statute fixes the period of twenty-eight hours as the limit of the time of continuous carriage of live stock without rest, food, and water; but it makes the proviso that the shipper, who is or represents the party in interest, may, if the circumstances seem to him to justify it, extend the time to a period of thirty-six hours. In so providing the law does not give him authority to make that unlawful which otherwise would be lawful.

The delegation of power in this instance is not unlike that which is made by local option laws, in which the legislature provides that one may not sell liquor in a given place unless the majority of those interested shall by vote grant him the power. Such a law was the act of the legislature of Illinois, imposing a fine on one who sells goods within a mile of a camp meeting without the consent of the parties in charge, which was held constitutional in *Meyers v. Baker*, 120 Ill. 567, 12 N. E. 79, 60 Am. Rep. 580. In *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253, it was held that, although Congress may not delegate power strictly and exclusively legislative, yet "Congress may certainly delegate to others powers which the legislature may rightly exercise itself." In *Union Bridge Company v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, the question arose whether power to legislate was delegated to the Secretary of War by an act which gave him the right to determine whether or not a bridge constructed across a navigable stream of the United States is an unreasonable obstruction to navigation. The court, after reviewing the authorities, held that in no substantial, just sense did the act confer upon the Secretary of War power strictly legislative. Said the court:

"By the statute in question Congress declared in effect that navigation should be free from unreasonable obstruction arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty, the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

It is contended that the act is void for uncertainty. It is said that no one can be reasonably sure what the meaning is of the proviso "that it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime, in case of sheep, the same may be continued in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours"; and our attention is directed to the fact that there is no limitation of thirty-six hours, unless the owner or custodian makes the written request provided for in the act. We find no substantial ground for holding that the act is uncertain. The meaning of the proviso is that if the twenty-eight hour limit expires in the night, in the case of sheep, transit may be continued to a suitable place for unloading, without the request of the owner or custodian, but that in no case shall the limit of thirty-six hours be exceeded. The court below charged the jury in substance that if it was obvious to the carrier that the thirty-six hour limit would expire in the nighttime, so that unloading could not then be accomplished, it was the carrier's duty to unload the sheep before dark. This, we think, is the plain meaning of the act. *United States v. Atchison, T. & S. F. Ry. Co.*, (D. C.) 166 Fed. 160, 163.

It is urged that the plea in abatement should have been sustained, and that the motion of the plaintiff in error for a directed verdict should have been granted, because it was shown that at Reno the plaintiff in error had received four separate consignments of sheep, consigned to one consignee at South San Francisco, and had conveyed all of said sheep upon the same train, and that therefore there could have been but one violation of the statute. The statute forbids the carrier of live stock to confine the same in cars for a longer time than the prescribed period without unloading the same. Section 3 provides that any carrier who knowingly and willfully fails to comply with the provisions of the act shall for such violation be liable, etc. The question is whether the unit in the case of violation of the act is the carload of live stock, or each individual shipment thereof. We are of the opinion that it is the latter. We find controlling reason for so holding in the proviso of section 1:

"That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading or other railroad form, the time of confinement may be extended to thirty-six hours."

Said the Circuit Court of Appeals for the Eighth Circuit in *United States v. Baltimore & O. S. W. R. Co.*, 159 Fed. 33:

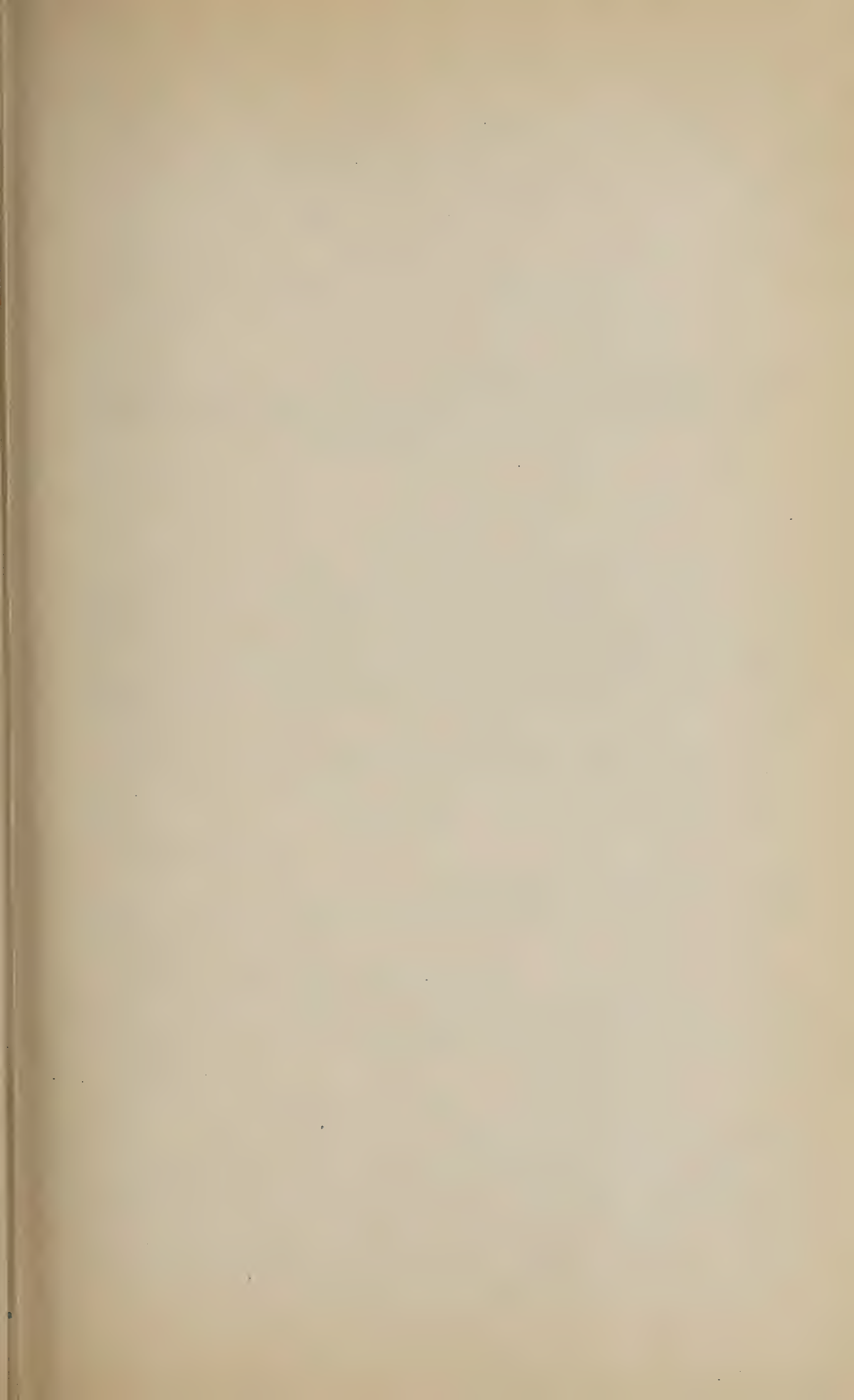
"It is the owner of the shipment, or his representative having custody of the shipment, who is to be referred to as authority for prolonging the transportation without unloading; and it is manifestly implied that there is a bill of lading or other contract which governs the transportation of that shipment. No other person than the one concerned with

that shipment is given the power to prolong the transportation without unloading. And one shipper could not exercise his right if he was one of several; or, if he could, it would disable other shippers from exercising the right to have their stock unloaded for rest and feeding and then go on."

The same conclusion was reached in *United States v. Oregon R. & N. Co.* (C. C.), 163 Fed. 642, *New York Cent. & H. R. R. Co. v. United States* (C. C. A.), 165 Fed. 833-843, *United States v. Atchison, T. & S. F. Ry. Co.* (D. C.), 166 Fed. 160-164, and *United States v. New York, C. & St. L. R. Co.* (C. C. A.), 168 Fed. 699. We find no error.

The judgment is affirmed.

O



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 24.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Ninth Circuit, affirming the decision of the District Court of the United States for the Northern District of California, in a case involving a violation of the Twenty-eight Hour Law (Act of June 29, 1906, 34 Stat., 607).

SYLLABUS.¹

1. Actions under the Twenty-eight Hour Law are civil actions,
2. Consequently, in authorizing an action to be brought in the circuit or district court of the United States within the district where the violation may have been committed, or the person or corporation resides or carries on business, section 4 of the Twenty-eight Hour Law is not in violation of the sixth amendment to the Constitution, which guarantees to the accused a trial in the district where the crime has been committed.

CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

SOUTHERN PACIFIC COMPANY }
v. } No. 1671.
UNITED STATES. }

In error to the District Court of the United States for the Northern District of California. (171 Fed., 364.)

Decided July 6, 1909.

For opinion below, see 162 Fed., 412.

C. W. DURBROW and KNIGHT & HEGGERTY, for plaintiff in error.

ROBERT T. DEVLIN, U. S. attorney, and ALFRED P. BLACK, assistant U. S. attorney.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This action was brought by the defendant in error to recover from the plaintiff in error a penalty for violation of Act Cong. June 29, 1906, c. 3594, 34 Stat., 607 (U. S. Comp. St. Supp. 1907, p. 918). In the complaint it was alleged that the plaintiff in error, a common carrier and a lessee of interstate railroads, received a

¹ Not by the court.

consignment of 1,355 sheep on December 4, 1906, at Corinne, Utah, consigned to South San Francisco, Cal., and that in carrying the sheep to their place of destination the plaintiff in error did knowingly and willfully confine them in its cars, en route between Wells, Nev., and Reno, Nev., a period of fifty-one hours and thirty minutes consecutively, without unloading them for rest, water, and feeding. The case presents, in addition to the questions which were discussed in case No. 1672 (171 Fed., 361), just decided by this court, the question of the jurisdiction of the court below to entertain an action to recover a penalty for a violation of the statute which occurred in the State of Nevada.

Section 4 of the act permits prosecution of an action in the Circuit Court or District Court held within the district "where the violation may have been committed or the person or corporation resides or carries on its business." It is not denied that the corporation owns the line of railroad over which the shipment was hauled, nor that its principal offices are in the city and county of San Francisco; but it is urged that to permit the prosecution in any other district than that within which the violation of the act occurred is contrary to the sixth amendment to the Constitution. If this were a criminal action, the point would be well taken. But this and other courts have decided that such an action is not a criminal action. *Montana Cent. Ry. Co. v. United States* (C. C. A.), 164 Fed. 400; *United States v. Baltimore & O. S. W. R. Co.*, 159 Fed. 33, 86 C. C. A. 223; *United States v. Sioux City Stock Yards Co.* (C. C.), 162 Fed. 556; *New York Cent. & H. R. R. Co.* (C. C. A.), 165 Fed. 833; *United States v. New York, C. & St. L. R. Co.* (C. C. A.), 168 Fed. 699.

The judgment is affirmed.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 25.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of Judge Smith McPherson, in the Western District of Missouri, in cases involving violations of the Twenty-eight Hour Law (Act of June 29, 1906, 34 Stat. 607).

SYLLABUS.*

1. A stock yards company owning stock yards at South St. Joseph, Mo., doing what is known as a terminal business, owning and maintaining switch tracks encircling its stock yards and connecting therewith and with trunk line railroads from which it receives and to which it delivers cars, so that all live stock in and out of its stock yards must pass over its lines and switches, and operating for the purpose locomotives with crews of men, issuing no bills of lading and receiving no part of the freight charges paid to the trunk line companies, but charging for each car moved from the connection of the trunk lines to its stock yards or to packing houses, is a railroad company and a common carrier of freight for hire, with the rights, duties, and obligations of a common carrier of freight for hire.

2. The transportation of cattle from a point in another State to the chutes at the stock yards at South St. Joseph, Mo., was a continuous shipment, all of which, including the transportation over the tracks of the stock yards company, was of an interstate character, within the meaning of the Twenty-eight Hour Law.

3. One purpose of the statute is to prevent the slaughtering of animals for food when in a feverish condition brought about by long confinement without food, water, and rest; but the main purpose is to prevent cruelty to animals shipped.

4. The statute can not be construed of no application because a defendant carrier did not know how long a connecting carrier had cattle in confinement without food or water; the defendant carrier must learn such fact at its peril, and this conclusion is not changed, but is emphasized by the fact that the defendant carrier did not seek to ascertain such fact.

5. The fact that a defendant carrier, after receiving from a connecting carrier cattle which had been confined without food or water beyond the prescribed period, acted promptly and quickly in unloading the same is not defensive, but is in mitigation.

* Not by the court.

IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF
MISSOURI, ST. JOSEPH DIVISION.

UNITED STATES	}	Nos. 448, 449, 450, 451.
vs.		
SAINT JOSEPH STOCK YARDS COMPANY.		

SMITH MCPHERSON, *Judge*.

In these cases, four in number, Nos. 449 and 450 being consolidated, a jury has been waived, and the cases were submitted on an agreed statement of facts. The cases are brought to recover penalties for confining cattle more than twenty-eight hours without food or water.

Defendant is a Missouri corporation, owning stock yards at South Saint Joseph, doing what is known as a terminal business. It owns 22.6 miles of single switch tracks, encircling the stock yards, and connecting therewith, and connecting with the trunk line railroads. So that all live stock in and out from the stock yards must pass over defendant's lines or switches. Over defendant's lines or switches defendant alone moves the cars. For that purpose it has six locomotives with crews of men to operate the same. The trunk line companies deliver and receive the cars at defendant's switches. When the cars are on defendant's switches the trunk line companies have nothing whatever to do with them.

The defendant issues no bills of lading, and receives no part of the freight charges paid to the trunk line companies. The defendant, regardless of weight, commodity or value of contents of the car, receives one dollar for each car moved from the connection of the trunk line to the stock yard or the packing house. The defendant owns all the land on which the stock yards and its switches are located.

One of the shipments in suit illustrates them all. A car of cattle was shipped March 14, 1907, from Wilcox, Nebraska, to South Saint Joseph, Missouri. Roy M. Strong was consignor, and Byers Brothers Commission Company, at the stock yards, consignee. The cattle were loaded at Wilcox, Nebraska, at 5.30 a. m. March 14 and shipped over the Chicago, Burlington and Quincy Railroad, and by that company delivered to defendant at 10.10 a. m. March 15, 1907, and unloaded by defendant at 11.15 a. m., or one hour and five minutes after they were received by defendant, and after a confinement of twenty-nine hours and forty-five minutes without food or water. This car was one of a train of twenty-seven cars of live stock, all of which had been on the cars for more than twenty-eight hours without food or water.

No request for extension of time of confinement of the cattle to thirty-six hours was made. After defendant received the cattle, as stated, it unloaded them in one hour and five minutes, which was as quickly as could be done, as they had to be weighed before being unloaded. When defendant received the cattle, as of course the Burlington Company

knew how long the cattle had been in the car without food or water. The defendant company did not know. And there is no evidence that defendant company sought to learn such fact.

Without discussing them, these facts lead the court to the following conclusions :

1. Defendant is a railroad company. As such it is a common carrier of freight for hire, with the rights and privileges, duties and obligations of a common carrier of freight for hire.

2. The transportation of the cattle from Wilcox, Nebraska, to the chutes at the stock yards at South Saint Joseph, Missouri, was a continuous shipment, all of which, including the transportation by the defendant over its tracks, was of an interstate character, and all of which was covered by the statute forbidding such confinement more than twenty-eight hours in the absence of the written request to carry them for thirty-six hours.

3. The purpose of the statute is remedial, and for humane purposes. One purpose is to prevent the slaughtering of animals for food when in a feverish condition brought about by long confinement without food, water, and rest. But the main purpose is to prevent cruelty to animals shipped. These being so, the statute can not be construed of no application, because the defendant, the connecting carrier, did not know how long the Burlington Company had the cattle in confinement without food or water. The connecting carrier must learn such fact at its peril. This conclusion is not changed, but it is emphasized by the fact that the defendant did not seek to ascertain such fact.

4. After the defendant received the cattle, as covered by all the actions now before the court, it acted promptly and quickly. But that is not defensive; but such action is in mitigation.

5. The penalty will be imposed in each of the three cases of one hundred dollars.

SAINT JOSEPH, MISSOURI, *September, 1909.*

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 26.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the United States Circuit Court for the District of Minnesota, Third Division, in a case involving an alleged violation of the Act of June 29, 1906 (34 Stat. 607).

SYLLABUS OF THE OPINION.*

1. In estimating the time during which live stock have been confined by a connecting carrier, without water, feed, or rest, the period during which they had been so confined, in excess of the statutory limit, by the preceding carrier, at the time of delivery to the connecting carrier, is not to be counted, where the preceding carrier has been already sued, under the Twenty-eight Hour Law, for so confining the live stock and has been subjected therefor to the penalty imposed by that act.

(The Attorney-General has directed that an appeal be taken in this case.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION.

UNITED STATES, *Plaintiff,*

vs.

STOCKYARDS TERMINAL COMPANY, *Defendant.*

C. C. HOUP, *U. S. District Attorney.*

DAVIS, KELLOGG & SEVERANCE and ROBERT E. OLDS, for defendant.

WILLARD, *District Judge.*

This action is brought to recover a penalty under the act of June 29, 1906, entitled "An act to prevent cruelty to animals while in transit," commonly called the "Twenty-eight Hour Law" (34 Stat. 607, c. 3594, [U. S. Comp. St. Supp., 1907, p. 918]). The complaint states two causes of action; but on the trial the case was dismissed as to the second cause of action, and as to the first it was heard upon an agreed statement of facts.

A shipment of five car loads of cattle was loaded at Lavina, Mont., at 11 p. m. July 31, 1908, consigned to the Union Stock Yards, Chicago, Ill., was thence carried by the Chicago, Milwaukee & St. Paul Railway Company to Daytons Bluff, St. Paul, Minn., and there delivered to the defendant at 6.35 a. m. on August 3. The time intervening between the completion of the loading at Lavina and the delivery of the shipment to the defendant was fifty-five hours and thirty-five minutes. The stock was carried by the defendant company from Daytons Bluff to the stock

*Not by the court.

yards at South St. Paul, a distance of about 11 miles, for the sole purpose of being unloaded, rested, watered, and fed. The unloading was commenced at said stock yards at South St. Paul at 8.40 on the morning of August 3. The stock was therefore in the custody of the defendant company two hours and five minutes. It thus appears that the animals were continuously confined without food, water, and rest for a total period of fifty-seven hours and forty minutes. By virtue of a request of the owner of the stock, the time of confinement was extended to thirty-six hours.

The Government brought an action under the statute above cited against the Chicago, Milwaukee and St. Paul Railway Company to recover a penalty for confining this stock, in violation of law, for more than thirty-six hours. Judgment was rendered in that action in favor of the Government, and against the Chicago, Milwaukee & St. Paul Railway Company, for a penalty of \$250, which judgment has been paid and satisfied. The violation of the law for which the Chicago, Milwaukee & St. Paul Railway Company was thus punished related to at least the first thirty-six hours of the confinement of the stock, and this period terminated on August 2 at 11 a. m. No part of this time elapsed while the defendant was in possession of the stock, and with this violation of the law on the part of the Chicago, Milwaukee & St. Paul Railway Company the defendant had nothing to do. It is true that the act provides that—

“In estimating such confinement the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without rest, food, or water on such connecting road shall be included.”

But in this case the first thirty-six hours elapsed while the stock was in the possession of the Chicago, Milwaukee & St. Paul Railway Company, and can not be counted against the defendant. For the violation of the act during that time the law has been satisfied; the Chicago, Milwaukee & St. Paul Railway Company having been punished therefor. The only time elapsing while the stock was in the possession of the first carrier which could in any event be charged against the defendant is the time between 11 o'clock on the morning of the 2nd of August and 40 minutes past 8 on the morning of the 3rd day of August. This is twenty-one hours and forty minutes, being less than twenty-eight hours, or in this case thirty-six hours. There has been no violation of the act by the defendant railway company, and I make a general finding in its favor.

The other questions discussed by counsel on the trial and in their briefs need not be considered, in view of the result hereinbefore reached.

Let judgment be entered in favor of the defendant, and that the plaintiff take nothing by this action.

JULY 17, 1909.

42C
Issued December 10, 1909.

U. S. DEPARTMENT OF AGRICULTURE,

OFFICE OF THE SOLICITOR.—Circular No. 27.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT-HOUR LAW.

This circular embodies decisions of the federal courts and an opinion of the Attorney-General of the United States construing certain phases of sections 4386–4390 of the U. S. Revised Statutes. These sections are no longer in effect, being supplanted by the present statute, the act of June 29, 1906 (34 Stat., 607), commonly known as the “Twenty-eight-hour law.” It is thought, however, that these decisions may be of use to the officers of the Government interested in the enforcement of the act in construing provisions of the present statute which are similar to those of the sections of the Revised Statutes mentioned.

CIRCUIT COURT, EASTERN DISTRICT OF TENNESSEE, 1882.

UNITED STATES

v.

EAST TENNESSEE, VIRGINIA AND GEORGIA R. Co. }

RAILROADS—REV. ST., § 4386—UNLOADING SHEEP, ETC.

Section 4386 of the Revised Statutes of the United States, imposing a penalty upon railroads carrying sheep, swine, etc., if they allow such sheep, swine, etc., to be more than 28 consecutive hours confined without unloading them for at least five hours for rest, water, and feeding, does not apply to a railroad carrying sheep, swine, etc., from a point within a State to another point therein, but only to such as convey swine, sheep, etc., from one State to another.

KEY, D. J. This is an action for a penalty under sections 4386 et seq. The declaration alleges that defendant is a railroad company operating a line of railroad over which cattle, sheep, swine, and other animals are conveyed from Georgia and Tennessee to Virginia and other States; and that defendant received and loaded upon its cars at Limestone, Tennessee, a lot of swine consigned to Chattanooga, in said State; and that they did not have proper food, water, space, and opportunity to rest, and were confined for more than 28 consecutive hours without being unloaded for rest, food, and

water, and that in consequence the penalty of \$500 imposed by the statute has been incurred. Defendant demurs to this declaration upon the grounds—First, that the declaration shows that the swine were shipped within the State to a point within the State, and therefore the transaction falls not within the terms of the statute; second, if the terms of the statute embrace such a case, the statute is unconstitutional, because it interferes with the internal commerce of a State, in so far as it applies to such a transaction as the one alleged in the declaration. So far as I know or am informed the questions raised under this statute have not been before our courts for adjudication.

I have been referred by the district attorney to *Hall v. De Cuir* (95 U. S., 487), as bearing by analogy upon this case. In that litigation the State of Louisiana had passed a law for the regulation of the business of carriers of passengers within the State. This law had been disregarded by the defendant in that action, who was running a steamboat from New Orleans, Louisiana, to Vicksburg, Mississippi. The plaintiff had got upon the boat at New Orleans to be carried to a landing on the Mississippi River called “Hermitage,” in Louisiana. The points of embarkation and destination, as well as the river between them, were in Louisiana. A judgment was rendered in favor of the plaintiff in the inferior court of the State and affirmed upon appeal to the supreme court of the State, from whence it was taken to the Supreme Court of the United States and there reversed. The court say:

“The river Mississippi passes through or along the borders of 10 different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State would provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more; it would prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river, or its tributaries, he might be required to observe one set of rules and on the other side another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulation shall be.” (95 U. S., 489.)

In the case at bar the State of Tennessee has enacted no law in respect to the subject-matter of this contention. She has not entered the field of this legislation. It is occupied by Congress alone, and the case must stand or fall upon the proper construction of the terms of the act of Congress. If the act, by its terms, does not embrace a shipment of swine from one point within the State to another within it, over a line entirely within the State, the action must fail, and the other point raised by the demurrer will need no consideration.

Section 4386 of the Revised Statutes says:

“No railroad company within the United States, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another, * * * shall confine the same in cars * * * for a longer period than twenty-eight consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours.”

The first part of the paragraph describes the railroad to be affected by the statute as one forming a “part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another.” This does not include and cannot include any other animals than such as are conveyed from one State to another. It is so limited by its plain, unambiguous language. When the statute prescribes the rule or regulation by which the railroad is to be governed, it says “the same” shall not be confined, etc. The word “same” is here an adjective, and is defined to mean “not different or other; identical.” If we supply the ellipsis in the sentence, the law will read: “No railroad company within the United States, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another, shall confine the cattle, sheep, swine, or other animals to be conveyed from one State to another for a longer period,” etc. A simple grammatical construction of the language used confines the duties imposed to animals conveyed over the line of road from one State to another, and has no reference or relation to such as are shipped within the State to a point therein over a road within its limits. This view of the case renders it unnecessary to consider the other point raised by the demurrer. Whether Congress has the power to impose duties similar to those embraced in this statute in respect to shipments of animals within a State over railroads of the State to points within it does not arise. Congress in this statute, according to the view taken, has not attempted to do so.

The demurrer will be sustained and the bill dismissed.

(13 Fed., 642.)

DISTRICT COURT, DISTRICT OF MASSACHUSETTS. FEBRUARY 16, 1883.

UNITED STATES	}
v.	
BOSTON AND A. R. Co.	
SAME	
v.	
FITCHBURG R. Co.	

1. CARRIERS OF LIVE STOCK—CONSTRUCTION OF STATUTES.

By the provisions of the Revised Statutes of the United States, §§ 4386, 4390, no common carrier of cattle, sheep, swine, or other animals, conveying the same from one State to another, shall confine the same in cars, boats, or vessels for a longer time than 28 consecutive hours, without unloading the same for rest, water, and feeding for a period of at least five consecutive hours. Section 4387 gives to those who give such care a lien on the animals for the expenses incurred, and relieves them from liability for the detention. Section 4388 fixes the penalty for violating such statute at not less than \$100 nor more than \$500. Sections 4389 and 4390 provide that the penalty may be recovered by civil action in the name of the United States in the circuit and district courts, and that the lien given by section 4387 may be enforced by petition in the district court.

2. SAME—CONSTITUTIONALITY OF STATUTE.

Authority for this legislation is found in that clause of the Constitution which confers upon Congress the power to regulate commerce among the several States.

3. SAME—PENALTY FOR VIOLATION.

The penalty imposed by section 4388 is not less than \$100 nor more than \$500, where more than one animal is carried and confined in violation of the statute. The statute can not be so construed as to make the unlawful confinement of each animal constitute a separate offense, and thus multiply the penalty by the whole number of animals.

On demurrer.

A. E. PILLSBURY, for plaintiff.

A. L. SOULE, for Boston and A. R. Co.

W. S. STEARNS, for Fitchburg R. Co.

NELSON, J. These two cases are actions against railroad companies to recover penalties incurred under Rev. St., §§ 4386–4390. The answer in each case contains a demurrer to the plaintiff's declaration. Section 4386 reads as follows:

“No railroad company within the United States, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State to another, shall confine the same in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and

feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated."

Section 4387 makes it the duty of the owner or custodian, or in case of their default of the railroad company, or owners or masters of boats and vessels, to properly feed and water the animals when unloaded; gives to the latter a lien on the animals for the expense so incurred; and relieves them from liability for the detention:

SECTION 4388. Any company, owner, or custodian of such animals, who knowingly and willingly fails to comply with the provisions of the two preceding sections, shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred dollars nor more than five hundred dollars. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

Sections 4389 and 4390 provide that the penalty may be recovered by civil action, in the name of the United States, in the circuit and district courts, and that the lien given by section 4387 may be enforced by petition in the district court.

In the first case the declaration alleges that the—

"Defendant's road forms part of a line of road over which cattle, sheep, and swine are conveyed from one State to another, to wit, from the State of New York to the State of Massachusetts;" that in July, 1882, the "defendant, being engaged in conveying 1,380 sheep over its said road from Albany, in the State of New York, to Boston, in the State of Massachusetts, did knowingly and willfully confine said sheep, and each and every one thereof, in cars upon its said road, without unloading the same for rest, water, and feeding for the period of five hours, in any period, for and during a longer period than 28 consecutive hours, to wit, for 41 consecutive hours, inclusive of the time during which said animals had been so confined without such rest on a connecting road, to wit, the New York Central and Hudson River Railroad, from which said defendant received the same; that said defendant or said connecting road was not prevented from so unloading said animals or any thereof by storm or other accidental cause, and that said animals were not then and there carried by the defendant, or by said connecting road, in cars or other conveyance in which they could and did have proper food, water, space, and opportunity to rest."

The penalty demanded is "\$100 for each of said animals, to wit, the sum of \$10,000."

In the second case the declaration is similar in substance, and alleges that the—

“Defendant’s road forms part of a line of road over which cattle, sheep, and swine are conveyed from one State to another, to wit, from the State of Vermont to the State of Massachusetts,” and that in July, 1882, the defendant, “being engaged in carrying 1,875 swine over its said road from Winchendon to Cambridge, in said State of Massachusetts, in the course and as a part of the transportation of said swine from points in the Dominion of Canada into and through said State of Vermont, and thence into and through said State of Massachusetts to said Cambridge, did knowingly and willfully,” etc.

The penalty demanded is “\$100 for each of said animals, to wit, the sum of \$10,000.”

1. The first ground of demurrer stated is that the statute on which the declaration is based is unconstitutional and void. Authority for this legislation is found in that clause of the Constitution which confers upon Congress the power to regulate commerce among the several States. In Congress alone, under the Constitution, is this authority vested. No State is competent to make regulations of this character, and until Congress exercises its authority upon the subject transportation of merchandise from one State to another is free. All this is settled beyond controversy by a long line of decisions of the Supreme Court. (*Gibbons v. Ogden*, 9 Wheat., 1; *Welton v. Missouri*, 91 U. S., 275; *Sherlock v. Alling*, 93 U. S., 99; *Railroad Co. v. Husen*, 95 U. S., 465; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S., 1; *Telegraph Co. v. Texas*, 105 U. S., 460; *Bridge Co. v. U. S.*, 105 U. S., 470; *Sweatt v. Railroad Co.*, 3 Cliff., 339.) The statute in question is directly within the terms of this clause of the Constitution. It imposes regulations upon a particular class of traffic between States, and declares in what manner and upon what conditions it shall be carried on. The statute can not be any the less within the constitutional authority of Congress, because its object is to require the humane treatment of live animals when in course of transportation as articles of commerce from one State to another. A railroad company in this State, whose road forms part of a line of road over which live animals are conveyed from another State to points in this State and which receives from its connecting roads to be transported in this State animals which have been brought from another State, is engaged in interstate commerce, and as such is within the terms of the act of Congress.

2. The second ground of demurrer is that the penalty sued for is not the penalty imposed by the statute. This must be sustained. The confinement of the entire number of animals for a longer period than 28 consecutive hours, without unloading for rest, water, and feeding, is a single offense, for which the defendants are made liable to the penalty. By no fair construction of the statute can the unlaw-

ful confinement of each animal be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of animals carried. The statute fixes the penalty at "not less than one hundred nor more than five hundred dollars." Within these limits the amount of the penalty is to be determined by the court, after verdict for the plaintiff. The plaintiff can only sue for the penalty prescribed by the statute.

The demurrers are overruled on the first ground and sustained on the second. The plaintiff is to have 10 days within which to amend its declaration in each case. Ordered accordingly.

(15 Fed., 209.)

DISTRICT COURT, MIDDLE DISTRICT OF TENNESSEE. NOVEMBER 20, 1883.

UNITED STATES

v.

LOUISVILLE AND N. R. Co.

1. PRACTICE—EXCEPTIONS TO DEPOSITIONS.

Where depositions are taken to be used as evidence in the federal courts in Tennessee, upon interrogatories filed with the clerk, where the witness resides over 100 miles from the place of trial, the notice served upon the opposite party need not state the time and place of taking the deposition; nor need it state the cause for taking the deposition. The clerk may issue the commission to take the deposition without an order of court.

2. CARRIERS OF LIVE STOCK—CONSTRUCTION OF REV. ST., §§ 4386-4390.

By the provision of the Revised Statutes, §§ 4386-4390, any railroad company, whose road forms any part of a line of road over which animals are conveyed from one State to another, is prohibited from confining the same in cars over 28 consecutive hours, without unloading them for rest, water, and food for at least five consecutive hours. Section 4388 fixes the penalty for the violation of this statute at not less than \$100 nor more than \$500.

3. SAME—TIME—HOW COMPUTED.

In estimating such confinement, the time during which the animals have been so confined prior to their delivery to the defendant must be included. (Section 4386.)

4. SAME—LIABILITY OF CARRIER.

But, with this exception made by the statute, the carrier is liable only for the default occurring upon his own road; and, if other connecting lines confine the animals beyond the time prohibited, after they pass out of the control of the first carrier, there is no violation of the statute by it. This would be so, although the first carrier contracted for itself and its connecting lines to carry them to their destination.

The defendant issued its bill of lading whereby it and its connecting lines undertook to carry two cars of mules from Nashville to Vicksburg, the shipper contracting to accompany the stock and to feed and water them en route. It appeared from the proof that the Louisville and Nashville Railroad Company leased and operated the Nashville and Decatur Railroad, which extends from Nashville,

Tennessee, to Decatur, Alabama; and although the first-named company owned a majority of the stock of the South and North Alabama Railroad Company, whose line extends from Decatur to Montgomery, Alabama, the latter company, as a distinct corporation, operated and controlled its own road by its own officers and employees. At Decatur, the terminus of its own line, the defendant delivered the stock to its connecting line, the South and North Alabama Railroad Company, within the 28 hours after being loaded. In the course of the transportation they were delivered to several different carriers, and there was proof tending to show that while in their custody the stock were confined over 28 hours without food or water.

The plaintiff took the deposition of the shipper, who resided more than 100 miles from the place of trial, by filing interrogatories with the clerk and giving notice thereof to the defendant, who failed to cross-examine. The defendant excepted to the reading of the deposition, because (1) the notice failed to state the time and place of taking the deposition; (2) the notice did not state the cause for taking the deposition; (3) the clerk could not issue the commission to take the deposition without an order of the court. The court held that the plaintiff may pursue the state practice in taking depositions, and, having conformed to it in these particulars, the exceptions were disallowed.

A. McCLAIN, U. S. Dist. Atty., and J. R. DILLON, Asst. U. S. Dist. Atty., for plaintiff.

ED. BAXTER, DICKINSON & FRAZER, and SMITH & ALLISON, for defendant.

KEY, J. (charging jury). This action is brought by the Government, under sections 4386 et seq. of the Revised Statutes, to recover a penalty of not less than \$100, nor more than \$500, for the failure of the defendant, as a carrier of live stock, to comply with the requirements of said sections in the transportation of two cars of mules, shipped by J. M. Smither, January 25, 1882, from Nashville to Vicksburg. The contract entered into between the shipper and the defendant has been read to you; and by its terms it appears that the defendant agreed for itself, and its connecting lines, to carry the animals from the point of shipment to their destination. Whether they have carried out that agreement—whether the shipper carried out his agreement to go along with the stock and feed and water them—does not concern us in this action. If the stock were damaged by a breach of the contract on the part of the defendant, it is a matter to be tried in an independent action by the shipper. He is no party to this suit. We are confined solely to the inquiry, Has there been a violation of the act of Congress prohibiting railroads from confining animals in cars for a longer period than 28 consecutive hours without unloading them for at least five consecutive

hours, and resting, feeding, and watering them within that time? Section 4386 reads as follows:

“No railroad company within the United States, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another, * * * shall confine the same in cars * * * for a longer period than twenty-eight consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated.”

Section 4387 makes it the duty of the railroad company, if the owner fail to do so, to feed and water the animals when so unloaded. Section 4388 provides that “any company * * * who knowingly and willingly fails to comply with the provisions of the two preceding sections shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred dollars nor more than five hundred dollars.”

The declaration charges the defendant with knowingly and willingly violating these statutes. It will be noticed that the horse or mule is not mentioned *eo nomine* in the act. Cattle and other quadrupeds used for food appear to be the primary objects of protection by Congress from long confinement without food or water. We know, too, as a part of the history of the times which induced this legislation, that immense numbers of cattle were shipped over the long lines of railroads in the west to the eastern cities, deprived of food and water for days, and stopped at the stock yards before being carried into the great cattle markets, like New York, and there gorged with food and water. Consequently these statutes were passed not more from considerations of sympathy for the cattle than to protect the public from imposition and from unwholesome food. The term “other animals” is also employed in the statute, which would include, of course, mules and horses.

You will also notice that it is only intended by this law to affect those companies whose roads form a part of a line of roads over which animals are conveyed, extending “from one State to another.” If the line lies wholly within the territorial limits of any State, then this would be a matter not given to Congress by the Constitution, this act of the National Legislature would not apply, and we would have to look to state legislation for relief.

You will have to look to the proof and ascertain how long these animals were confined in the cars by the defendant after they were loaded; whether for a longer time than the period fixed by the statute which I have just read. It is conceded that defendant was the

first carrier to receive the stock after they were loaded on the cars. The chief difficulty is one of law. Is the defendant exonerated by proving that the statute was complied with while the stock was on its own road, or is it subject to this penalty if its connecting lines violated this law? The contention of the Government is that the first carrier is liable for the penalty under this act, provided others in the chain of carriers violated the law after the stock had passed out of the control of the carrier with whom the contract of shipment was made. The defense pleads that this, being a penal statute, must be strictly construed; and, furthermore, the intention of the legislature, as expressed in section 4388, was to punish that company alone which "knowingly and willfully fails to comply with the provisions of the statute." As to how that is, the act itself must govern; and it must furnish, if unambiguous, its own interpretation. To my mind it is clear enough without resorting to any artificial rules of construction. The law declares that no railroad company transporting animals, etc., shall confine them in cars longer than 28 hours—that is, the company having possession of them when the 28 hours expires. That company alone has it in its power to comply with the statute, and therefore that company alone should be punished for a failure to comply with the law. If anything else was required, this construction is made clear by the last clause of section 4386: "In estimating such confinement the time during which the animals *have been* confined without such rest on connecting roads, from which they are received, shall be included." There is no provision made for adding the time that they may be confined on connecting roads thereafter.

So the defendant will not be liable for this penalty if you find that as many as 28 hours had not elapsed, after the mules were loaded, before they were delivered to its first connecting carrier. When and where this delivery was made you must decide from the proof. This would be so, no matter what the particular contract may have been in this case between the shipper and carrier. It could not add to or take from the act of Congress. That act requires the shipper to feed and water them in the first instance; but if he fails, the carrier must do it for him, and the act gives him a lien upon the stock for his reimbursement. The first carrier, contracting for itself and its connecting lines, may be required to deliver the stock at its ultimate destination; and if it fail to comply with the contract, the shipper may hold him liable for any damages that may have accrued either upon its own road or upon any of the several connecting roads resulting from a failure to feed and water the stock. But that carrier alone would be liable for this penalty who had actual manual possession of them at the time the period expired which has been fixed by Congress.

Verdict and judgment followed for the defendant.

(18 Fed., 480.)

CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT. APRIL 3, 1894.

NEWPORT NEWS AND M. VAL. CO.	} No. 45.
v.	
UNITED STATES.	

CARRIERS—LIVE STOCK—PENALTY FOR FAILURE TO UNLOAD.

Under Rev. St., §§ 4386-4388, forbidding interstate carriers of animals to confine them more than 28 consecutive hours without unloading for rest, water, and feeding, unless prevented "by storm or other accidental causes," and imposing a penalty for "knowingly and willingly" failing to comply with this provision, such unloading is excused by unavoidable causes only, and therefore not by an accident to a train, due to negligence.

In error to the district court of the United States for the district of Kentucky.

HOLMES CUMMINS, for plaintiff in error.

GEO. W. JOLLY, for the United States.

Before TAFT and LURTON, Circuit Judges, and KEY, District Judge.

LURTON, *Circuit Judge*. This was a suit by the United States to recover from the Newport News and Mississippi Valley Company the statutory penalty imposed by sections 4386, 4387, and 4388 of the Revised Statutes of the United States for the detention of cattle while being transported over appellant's line of railroad, for a longer period than 28 consecutive hours without being unloaded for rest, food, and water. There was a verdict of guilty, from which the railroad company has appealed. The statute involved is as follows:

SEC. 4386. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State to another, shall confine the same in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement, the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated.

SEC. 4387. Animals so unloaded shall be properly fed and watered, during such rest, by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company or owners or masters of boats or vessels transporting the same, at the expense of the owner or person in custody thereof; and such company, owners, or masters shall in such case have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals.

SEC. 4388. Any company, owner, or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

The district judge charged the jury, in substance, that if they found that the live stock had been confined on the cars of the appellant company for a longer period than 28 consecutive hours without being unloaded for rest, food, and water, it would be no defense that such confinement had been caused by an accident to the train, due to negligence. The case must turn upon the correctness of this charge. Was the appellant "prevented from unloading by storm or other accidental causes?" If so, then the penalty has not been incurred. The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that Congress has to that class added another of a different character, described as "other accidental causes;" that the use of the disjunctive "or," after "storm," indicates a purpose to except detentions due to causes not the act of God, and described by the term "accidental;" that this construction finds support in section 4388, which imposes the penalty only upon such carriers as "knowingly and willingly" fail to comply with the requirements.

This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because the carrier had encountered a storm therefore he should be excused. It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show, not only the fact of a storm, but that with due care he was "prevented," as an unavoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression "other accidental causes."

If the storm is no excuse, unless its unavoidable effect was to prevent compliance, then it follows that no other accidental causes

would be an excuse, unless that cause and its effect are likewise unavoidable. The meaning of the general words, "other accidental causes," must be ascertained by referring to the preceding special words. The rule "*noscitur a sociis*" is clearly applicable. A storm is unavoidable in the sense that it can not be prevented. "Other accidental causes" must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention but an effect of that negligence. What is an inevitable or unavoidable accident has been very thoroughly considered by this court in the case of *Weeks v. Transit Co.* (61 Fed., 120). It was there said that an inevitable accident—

"was an occurrence which could not be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case."

Again, we said:

"An accident is said to be inevitable when it is not occasioned in any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise."

These definitions apply to an unavoidable accident, which is, in the sense of the law, an inevitable occurrence, as defined in that case and those cited therein. If the accident was one which might have been avoided by due care, then the carrier must be taken to have contemplated the reasonable consequences of his own negligence. In this sense, he may be said to have "knowingly and willingly" failed to comply with the requirements of the law. If he was not prevented by lawful excuse, he has knowingly and willingly failed to unload for rest, food, and water, as required by law. The several sections of the act must be construed together. We must give effect to the first section, as well as to the third. To put the construction upon the words "knowingly and willingly" contended for by appellant would be to eliminate the positive terms of the affirmative section of the act. Congress has specified the excuse which will take a case without the act. If the statutory contingencies are not shown to have prevented compliance, the carrier has willingly failed to unload as required.

In view of this construction of the act, the other assignments of error are immaterial. The case turned below exclusively upon the question as to whether the delay in unloading had been due to a negligent accident to the train. The facts were submitted to the jury under a proper charge, so far as appellant is concerned.

The judgment must be affirmed.

(61 Fed., 488.)

[Cir. 27]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES	} No. 169.
v.	
HARRIS.	

Argued March 5, 6, 1900. Decided April 9, 1900.

A receiver of a railroad is not within the letter or the spirit of the provisions of the act of March 3, 1873, c. 252, 17 Stat., 584, entitled "An act to prevent cruelty to animals while in transit by railroad or other means of transportation within the United States," now incorporated into the Revised Statutes as sections 4386, 4387, 4388, and 4389.

This was a suit brought in November, 1895, in the district court of the United States for the eastern district of Pennsylvania, by the United States against Joseph S. Harris, Edward M. Paxson, and John Lowber Welsh, receivers of the Philadelphia and Reading Railroad Company, to recover a penalty in the sum of five hundred dollars for an alleged violation of sections 4386, 4387, 4388, and 4389 of the Revised Statutes of the United States.

There was a verdict in favor of the United States, but afterwards, on a question reserved at the trial, judgment was entered in favor of the defendants *non obstante veredicto*. (78 Fed. Rep., 290.) Thereupon a writ of error was sued out from the circuit court of appeals for the third circuit, and on March 14, 1898, the judgment of the district court was affirmed. (57 U. S. App., 259.) The cause was then brought to this court on a writ of certiorari.

Mr. SOLICITOR GENERAL for the United States.

Mr. JOHN G. LAMB for Harris.

Mr. Justice SHIRAS delivered the opinion of the court.

This was an action to recover penalties for an alleged violation of the laws of the United States relating to the transportation of live stock; and the question involved is whether the defendants, who were in charge and control of the Philadelphia and Reading Railroad as receivers, appointed by the circuit court of the United States, were liable in such an action.

The act under which this suit was brought was passed March 3, 1873, and was entitled "An act to prevent cruelty to animals while in transit by railroad or other means of transportation within the United States." It appears in the Revised Statutes as sections 4386, 4387, 4388, and 4389, as follows:

SEC. 4386. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State to another shall confine the same in cars,

boats, or vessels of any description for a longer period than twenty-eight consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated.

SEC. 4387. Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company or owners or masters of boats or vessels transporting the same at the expense of the owner or person in custody thereof; and such company, owners, or masters shall in such case have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals.

SEC. 4388. Any company, owner, or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections, shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. But when animals are carried in cars, boats, or vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

SEC. 4389. The penalty created by the preceding sections shall be recovered by civil action in the name of the United States, in the circuit or district court of the United States, holden within the district where the violation may have been committed, or the person or corporation resides or carries on its business; and it shall be the duty of all United States marshals, their deputies and subordinates, to prosecute all violations which come to their notice or knowledge.

The contention on behalf of the Government is that, by the words "any company," used in section 4388, Congress intended to embrace all common carriers, whether by rail or water, upon whom the duty was imposed by section 4346 of unloading and feeding the animals; that the word "company" is used in a popular sense as signifying the person or persons, the association or corporation, carrying on the business of a common carrier by rail or water; that, as shown by its title, the act in question was a humane one, designed to prevent cruelty to animals while in course of interstate transit; that the regulations were to be complied with whenever animals were transported by rail or boat from one State or another; and that whoever had charge of the railroad or the boat had to see that these wholesome and humane regulations were obeyed or had to pay the penalty for violating them.

To strengthen the argument that Congress intended to include even receivers when managing a railroad under an appointment by a court, the government's counsel calls attention to the provisions of the second and third sections of the act of August 13, 1888, c. 866, 25 Stat., 433, 436, reading as follows:

SEC. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

It is claimed that the effect of such legislation is to place receivers upon the same plane with railway companies as respects their liability to be sued for acts done while operating a railroad.

Upon the whole, the proposition of the government's counsel is that the words "any company, owner, or custodian of such animals," used in section 4388, are intended to cover all those who can possibly violate the preceding two sections; that the words "every company" must therefore be held to include a railroad company, whether a person, a partnership, or a corporation, and whether acting individually or through officers or receivers.

It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulations of the States and of the United States, whose object is to promote the safety, comfort, and convenience of the traveling public. But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit was brought. Was it the purpose of Congress, when prescribing a penalty for any company, owner, or custodian of animals who knowingly and willingly fails to comply with the directions of the statute, to include receivers? Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the act?

It was the view of the courts below that receivers were plainly not within the letter of the statute, and not necessarily within its purpose or spirit; and an attentive examination has brought us to the same conclusion.

It must be admitted that, in order to hold the receivers, they must be regarded as included in the word "company." Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.

It may well be that Congress, in omitting to expressly include receivers in these sections, intended to leave them subject to the control and direction of the courts, whose officers they are. It does not, therefore, follow that the statute in question would be without operation where railroads are in the hands of receivers. The owners and custodians of the stock would still remain subject to the punishment prescribed.

We can not better close this discussion than by quoting the language of Chief Justice Marshall, in the case of *United States v. Wiltberger* (5 Wheat., 76):

"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim and amounts to this, that though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be applied so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature obviously used them, would comprehend. The intention of the legislature is

to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule in other cases." (See likewise *Sarlls v. United States*, 152 U. S., 570.)

The judgment of the circuit court of appeals is affirmed.
(177 U. S., 305.)

CIRCUIT COURT, SOUTHERN DISTRICT OF MISSOURI, WESTERN DIVISION, APRIL 3, 1901.

UNITED STATES	}
v.	
ST. LOUIS AND S. F. R. CO.	

INTERSTATE COMMERCE REGULATIONS—CARRIERS OF LIVE STOCK—FAILURE TO UNLOAD TRAIN—ACTION FOR PENALTIES—COMPLAINT.

By Rev. St., §§ 4386–4390, no common carrier of live stock conveying it from one State to another shall confine the same in cars longer than 28 consecutive hours without unloading for rest, water, etc., and a penalty of from \$100 to \$500 for violating the statute is made recoverable in the name of the Government by a civil action. *Held*, that a carrier's confinement of a train load of cattle for a longer period than 28 hours without unloading was a single offense, within the meaning of such statute; and hence, in an action therefor, separate counts in the complaint or declaration for each car, intended to multiply the penalty by the number of cars, was not permissible.

The DISTRICT ATTORNEY, for the United States.

L. F. PARKER and JOHN T. WOODRUFF, for defendant.

ROGERS, *District Judge*.

This is a suit under sections 4386–90, inclusive, of the Revised Statutes of the United States. There are ten separate and distinct paragraphs in the complaint. The first is as follows:

"Comes now the United States of America, plaintiff in this suit, by William Warner, its attorney in and for the western district of Missouri, and files this, its declaration in this cause, and complains of the St. Louis and San Francisco Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of the said State of Missouri, and carrying on its business within the southern division of the western district of said State of Missouri, and says: That the defendant, the St.

Louis and San Francisco Railroad Company, is a railway corporation, and that defendant's road forms part of a line of road over which cattle, sheep, swine, and other animals are conveyed from one State to another, to wit, from the State of Texas, through the States of Arkansas and Missouri, to the State of Illinois, and more particularly from Weatherford, in the said State of Texas, through the State of Arkansas, and through the southern division of the western district of Missouri, in the State of Missouri, to the city of St. Louis, in said State of Missouri, and to the city of East St. Louis, in the said State of Illinois. That the St. Louis and San Francisco Railroad Company, defendant herein, is a railroad corporation within the United States, whose road, together with the Texas and Pacific Railroad, a corporation, forms part of a connecting line of railways over which cattle, sheep, swine, and other animals are transported and conveyed from one State to another, and more particularly from Weatherford, in the State of Texas, to said city of St. Louis, in the State of Missouri, and to the city of East St. Louis, in the State of Illinois. That on the 4th day of February, A. D. 1901, at or about 5 o'clock p. m., one William Corn loaded at Weatherford, Texas, 20 cotton-meal fed cattle, weighing 1,290 pounds each, upon Chicago, Rock Island and Pacific cattle car No. 76059, which said car was 36 feet in length, and bore the initials 'C. R. I. & P.' That the above-described car of cattle was consigned and shipped by one William Corn, of Mineral Wells, Texas, to Strayhorn, Hatton & Company, of Chicago, Illinois, with the privilege of the St. Louis market, by way of the Texas and Pacific Railroad and the St. Louis and San Francisco Railroad. That said car was hauled by the said Texas & Pacific Railroad from Weatherford, Texas, to Paris, Texas, and was then transferred to the said St. Louis and San Francisco Railroad for the balance of said trip to St. Louis, Missouri, and to East St. Louis, Illinois, aforesaid. That said car left Weatherford, Texas, for its destination at or about 5 o'clock p. m., February 4, 1901, arrived at Springfield, Missouri, at or about 7 a. m. of February 6, 1901, and arrived at St. Louis, Missouri, at or about 6 p. m. of February 6, 1901. That on or about the 6th day of February, A. D. 1901, the defendant, having engaged in conjunction with the connecting road aforesaid in conveying said 20 head of cattle so shipped as aforesaid in car No. 76059, C. R. I. & P., over its said road from Weatherford, in the State of Texas, to St. Louis, in the State of Missouri, through the southern division of the western district of Missouri, did within said division of said district knowingly and willfully confine said cattle, and each and every one thereof, in said car, upon said road, without unloading the same for rest and water for the period of five hours in any period for and during a longer period than twenty-eight consecutive hours, to wit, for more than fifty hours, inclusive of the time during which said animals had been confined without such rest and water upon the defendant's road, and upon its said connecting road, to wit, the Texas and Pacific Railroad, from which said connecting railway defendant received said cattle. That neither the said defendant nor its said connecting road was prevented from so unloading the said animals, or any thereof, for said purposes of rest and water, by storm or other accidental cause, and that said animals were not then and there carried by the defendant, or by said connecting road,

in cars or other conveyances in which they could and did have proper water, space, and opportunity to rest. Wherefore plaintiff prays judgment against said defendant for the penal sum of five hundred dollars (\$500), in accordance with the penalty prescribed by the statutes in such cases made and provided, and for costs in this suit."

All the other paragraphs are precisely the same as the above, except they state a different number of the car upon which the cattle were shipped. It is admitted in argument by the plaintiff, and it inferentially appears so strongly as to make it equivalent to an affirmative allegation, that the separate cars described in each count constituted one and the same train of cars, and it appears that all the cattle were shipped by the same consignor to the same consignee at the same time, and that they arrived at the different places specified in the complaint at the same time. So that it is manifest that the different cars described in the separate paragraphs of the complaint constituted one train and that the shipment of cattle was one shipment. The motion in this case is to require the plaintiffs either to strike out of their petition or declaration all of the counts but one, or to consolidate them all in one count. I do not think there is any difficulty at all in the construction of the statute. The only question is whether or not the proper remedy has been invoked. I am inclined to the opinion that it has, and that it is the duty of the court to require the plaintiff to elect which one of the ten counts in the complaint he will stand upon, or to require him to consolidate them all in one count. I have not been able to find a single decision bearing upon the precise question involved. I am not aware that the statute in that regard has been construed, but in *U. S. v. Boston and A. R. Co.* (D. C.), 15 Fed., 209, the question was raised whether the penalty did not attach to the unlawful confinement of each animal. District Judge Nelson held that it did not. He said:

"The confinement of the entire number of animals for a longer period than twenty-eight consecutive hours without unloading for rest, water, and feeding is a single offense, for which the defendants are made liable to the penalty. By no fair construction of the statute can the unlawful confinement of each animal be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of animals carried."

No reason can be assigned, in the opinion of the court, why the unlawful confinement of each car load of animals should be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of car loads shipped, which would not apply with equal force to the unlawful confinement of each animal. Manifestly, if Congress had intended to impose upon a railroad company the maximum penalty of \$500 for each head of cattle that might be unlawfully confined upon one of its trains, it would not have left it

to construction or inference; and it may be with equal propriety said that if Congress had intended to inflict so severe a penalty as \$500 for each car load of cattle that might be unlawfully confined, it would not have left it to construction or inference. It was an easy matter for Congress to have said, if it had so intended, that the unlawful confinement of each animal or each car load of animals should constitute a separate offense. And in reference to a statute so highly penal as this the construction must be strict—equally as strict as if it were a statute creating a criminal offense. Nothing must be imported by construction into a penal statute which is not within its spirit and its letter. This statute has already been construed to be highly penal. As said by District Judge Nelson, the plaintiff can only sue for the penalty prescribed by the statute, and in the opinion of the court that penalty attaches to the unlawful confinement of cattle upon a single train of cars, boat, or vessel upon which the cattle are being transported. A careful reading of the statute indicates that, in order to be entitled to the penalty, the cattle, sheep, or swine shall be confined in cars, boats, or vessels, making no distinction whatever between the three modes of conveyance. I am of the opinion, therefore, that the district attorney should be compelled either to elect upon which count in the complaint he will stand, or to consolidate the ten counts in one, either of which he may do at his election; and it is so ordered.

(107 Fed., 870.)

Transportation of Live Stock—Twenty-eight Hour Law.

[(Vol. XXV, Op. Atty. Gen., 411.)]

The acceptance at St. Louis by the Terminal Railroad Association of St. Louis or the St. Louis Merchants' Bridge Terminal Railway Company of live stock consigned to the National Stock Yards, lying directly across the Mississippi River from St. Louis, in Illinois, and the carriage and delivery there of live stock which has been confined in the cars of connecting railways for a period longer than twenty-eight hours without having been unloaded for rest, water, and feed, unless prevented by storm or other accidental causes, or unless the live stock is carried in cars in which it can and does have opportunity for feed, rest, and water, is a violation of the provisions of section 4386, Revised Statutes.

Section 4386 is unambiguous, and is clearly designed to prevent any railroad company within the United States, whose road forms any part of a line of road over which live stock is conveyed from one State to another, from transporting such animals except in accordance with its provisions.

DEPARTMENT OF JUSTICE,

April 27, 1905.

SIR: I have the honor to acknowledge the receipt of your letter of the 19th instant, with inclosures, presenting the question whether, upon the facts stated, sections 4386 to 4389, Revised Statutes, apply

to the Terminal Railroad Association of St. Louis or the St. Louis Merchants' Bridge Terminal Railway Company in the movement of live stock from St. Louis, Mo., to National Stock Yards, Illinois.

Section 4386 provides:

"No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State to another, shall confine the same in cars, boats, or other vessels of any description for a longer period than twenty-eight consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated."

It appears that the National Stock Yards are directly across the Mississippi River from St. Louis, Mo.; that the St. Louis Merchants' Bridge Terminal Company is a distinct corporation, but controlled by the Terminal Railroad Association of St. Louis, Mo., by reason of the latter company's ownership of the majority of the capital stock of the former company. It further appears that "by means of its owned, operated, and leased lines, the Terminal Railroad Association of St. Louis is the only company which can, or at least does, transport live stock from St. Louis, Mo., to National Stock Yards, Illinois;" that the run to National Stock Yards is made in from one to three hours, according to traffic conditions. It further appears that it is the "practice of the Terminal Railroad Association to accept all stock offered the company at St. Louis, Mo., to haul to National Stock Yards, Illinois, without inquiry, and in fact without regard to the number of hours during which the stock has been confined in cars on connecting line or lines without rest, water, and feeding before delivery to the Terminal Railroad Association of St. Louis."

You state "the view of the officers of the department having the matter in charge has been that any railroad company whose road forms any part of a line over which live stock is conveyed from one State to another, which confines said live stock in cars for a period longer than twenty-eight consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from so doing by storm or other accidental causes, or unless the live stock is carried in cars in which it can and does have opportunity for feed, rest, and water, is a violator

of the law. Further, that following the plain language of the statute, the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included in estimating such confinement."

I concur in this interpretation of the law, and upon the facts stated it is my opinion that the law applies to these terminal railroad companies.

The statute is unambiguous, and is clearly designed to prevent any "railroad company within the United States whose railroad forms *any part of a line of road* over which cattle, sheep, swine, or other animals are conveyed from one State to another," from transporting such animals under conditions other than those set forth in the statute.

It seems to be clear from your statement of the facts that these terminal companies accept stock for transportation to the National Stock Yards that has already been confined for more than twenty-eight consecutive hours without unloading for feed, rest, and water. That being so, the companies are undoubtedly liable for the penalty which the statute provides.

Respectfully,

W. H. MOODY.

The SECRETARY OF AGRICULTURE.

[Cir. 27]

O

Issued December 9, 1909.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 28.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinion of the Circuit Court for the District of Oregon, in cases involving violation of the Act of Congress of June 29, 1906 (34 Stat., 607), commonly known as the "Twenty-eight Hour Law."

SYLLABUS."

1. COSTS—GROUNDS—NATURE OF SUBJECT-MATTER—ACTION FOR PENALTY FOR VIOLATION OF TWENTY-EIGHT-HOUR LAW.

An action by the United States to recover from a carrier the penalty imposed by the act of June 29, 1906, c. 3594, 34 Stat., 607 (U. S. Comp. St. Supp. 1907, p. 918), for confining live stock more than 28 consecutive hours, is a civil action, with all the ordinary incidents of such an action, including liability of the defeated party for costs; but, if regarded as penal, on a recovery by the Government, the defendant is subject to the payment of costs by the terms of Rev. St., § 974 (U. S. Comp. St. 1901, p. 703).

2. COSTS—ATTORNEY'S FEES.

On a recovery by the Government in an action for violation of the act of June 29, 1906, c. 3594, 34 Stat., 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the "Twenty-eight Hour Law," in the district of Oregon, a docket or attorney's fee of \$40 is taxable against the defendant, under the provisions of Rev. St., §§ 824, 837 (U. S. Comp. St. 1901, pp. 632, 644).

3. COSTS—MILEAGE OF WITNESSES.

The prevailing party in a civil action in a federal court is entitled to tax as a part of his costs mileage for his witnesses for the distance necessarily traveled by them from any point to which a subpoena would run, viz, from any point within the district, and for not exceeding 100 miles for witnesses coming from without the district.

4. COSTS—MARSHAL'S FEES.

The prevailing party in a suit in a federal court is not entitled to tax against his opponent as a part of his costs the fees of the marshal for serving subpoenas on witnesses residing without the district and more than 100 miles from the place of trial.

" Not by the court.

5. COSTS—WITNESS FEES.

Under Rev. St., § 850 (U. S. Comp. St., 1901, p. 655), the United States, when the prevailing party in a suit in a federal court, is entitled to tax as costs the necessary expenses of a salaried employee taken away from his place of business to attend as a witness for the Government, regardless of the distance traveled by him.

UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON.

UNITED STATES OF AMERICA, *Plaintiff*,
vs.
 SOUTHERN PACIFIC COMPANY, *Defendant*.

On taxation of costs.

Walter H. Evans, Asst. U. S. Dist. Atty.

J. E. Fenton, for defendant.

BEAN, *District Judge*:

The plaintiff, having recovered judgment in two civil actions against the defendant for violation of act Cong. June 29, 1906, c. 3594, 34 Stat., 607 (U. S. Comp. St. Supp., 1907, p. 918), prohibiting any railroad company from confining animals while in transit from one State to another for more than 28 hours and which is commonly known as the "Twenty-eight Hour Law," filed its bill of costs in each of such actions. The defendant objects to the allowance of any costs, on the ground that the proceeding to recover the penalty provided in the act referred to is neither an action at law nor a suit in equity, but is a special proceeding, and since the act itself does not authorize or warrant the imposition of costs, in addition to the penalty therein provided for a violation of its provisions, no costs can be taxed. The defendant also objects to certain items in the complainant's bill of costs: First, a docket or attorney's fee of \$40; second, for the mileage of certain witnesses on behalf of the plaintiff who reside in this State and more than 100 miles from the place of trial; third, for the mileage of certain witnesses residing in the State of California; fourth, for the fees of the marshal of the northern district of California for serving subpoenas on witnesses in that district, and a similar item for the fees of the marshal of the district of Washington for serving a subpoena in that district; fifth, the expenses of one Hanson, an employé of the Reclamation Service, who was sent from Toppenish, in Washington, to testify as a witness in the case.

1. An action to recover the penalty provided in the act of Congress referred to is a civil action, with the ordinary incidents of such an action. *Montana Central Railway Co. v. United States*, 164 Fed., 400, 90 C. C. A. 388; *United States v. Southern Pacific Co.* (D. C.) 157 Fed., 459; *United States v. Baltimore Ry. Co.*, 159 Fed., 33, 86

C. C. A. 223; *United States v. Southern Pacific Co.* (D. C.) 162 Fed., 412; *New York Central Railroad Co. v. United States* (C. C. A.) 165 Fed., 833. And therefore the plaintiff, as the prevailing party, is entitled to its costs. *Western Coal & Mining Co. v. Petty*, 132 Fed., 603, 65 C. C. A. 667. Moreover, section 974 of the Revised Statutes (U. S. Comp. St., 1901, p. 703) provides that when judgment is rendered against the defendant in a prosecution, for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs. This section would seem to authorize the taxation of costs in actions of this kind.

2. Sections 824 and 837 of the Revised Statutes (U. S. Comp. St., 1901, pp. 632, 644) authorize the taxation and allowance, on a trial before a jury in a civil or criminal action prosecuted by the Government, of a docket or attorney's fee of \$40. These provisions, so far as they may relate to the district attorney, are not repealed or modified by act May 28, 1896, c. 252, 29 Stat., 179 (U. S. Comp. St., 1901, p. 611), placing district attorneys on salaries, except as to the disposition of such fees. Section 6 of the latter act provides that all fees and emoluments allowed by law to be paid United States attorneys and United States marshals shall be charged as heretofore, and shall be collected, as far as possible, and paid to the clerk of the court having jurisdiction, and by him covered into the Treasury; and section 17 declares that sections 6 to 16, inclusive, shall not be construed to prevent or affect the assessment or taxation of costs against the unsuccessful party in a civil proceeding, or against defendants convicted of crimes or misdemeanors.

3. The extent to which the prevailing party in a civil action may charge against his adversary mileage fees of witnesses who attended the trial on his behalf is a subject of much conflict in the federal decisions. The question has not been authoritatively decided by the Supreme Court or the court of appeals, so far as I am advised. In some jurisdictions it is held that the successful party is entitled to the mileage of his witnesses, regardless of the place of their residence, or whether they came from or out of the district, and whether they attended in obedience to a subpoena or at the request of the party. *United States v. Sanborn* (C. C.) 28 Fed., 299. In others it is held that since section 863, Rev. St. (U. S. Comp. St., 1901, p. 661), provides for taking the deposition of a witness residing more than 100 miles from the place of trial, the clerk has no authority to allow mileage for a witness residing at a greater distance, whether within or without the district. *Smith v. Chicago & Northwestern Ry. Co.* (C. C.), 38 Fed., 321. The rule, however, supported by the great weight of authority, is that the prevailing party in a civil action is entitled to charge, as part of his costs, mileage for the distance necessarily traveled by a witness to attend the trial on his behalf from any place

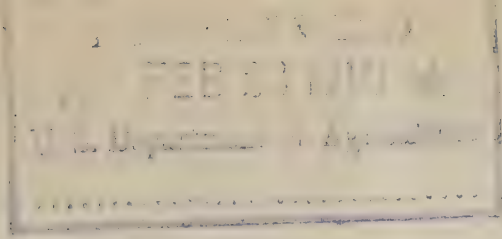
to which a subpoena will run; that is, from any point within the district, or from any point out of the district and not exceeding 100 miles from the place of holding court. *The Syracuse (C. C.)*, 36 Fed., 830; *Eastman v. Sherry (C. C.)*, 37 Fed., 845; *Burrow v. Kansas City R. R. Co. (C. C.)*, 54 Fed., 278; *The Vernon (C. C.)*, 36 Fed., 113; *Sloss Iron & Steel Co. v. South Carolina Ry. Co. (C. C.)*, 75 Fed., 106; *Griggsby Construction Co. v. Louisiana Ry. Co. (C. C.)*, 123 Fed., 751; *Buffalo Ins. Co. v. Steamship Co. (C. C.)*, 29 Fed., 237. And this seems to be the rule prevailing in this district and circuit. *Spaulding v. Tucker*, 2 Sawy., 50, Fed. Cas., No. 13221; *Haines v. McLaughlin (C. C.)*, 29 Fed., 70; *Hunter v. Russell (C. C.)*, 59 Fed., 964; *Hanchett v. Humphrey (C. C.)*, 93 Fed., 895. The costs in this case will be taxed in accordance with this rule, and plaintiff will be allowed to include in its judgment the mileage of its witnesses residing in the State, and not to exceed 100 miles for those residing out of the State.

4. A witness residing out of the district and more than 100 miles from a place of trial can not be compelled to attend in obedience to a subpoena. The service of a subpoena upon him by the marshal amounts to nothing more than a request to attend, and the prevailing party is therefore not entitled to charge against his opponent as a part of the cost the marshal's fees for serving such a subpoena. This is the interpretation given *Parker v. Bamker*, 6 McLean, 631, Fed. Cas., No. 10725, by Judge Sawyer, in *Spaulding v. Tucker*, *supra*, and is a reasonable rule.

5. The witness Hanson was a salaried employé of the Government in the Reclamation Service, and was sent from his place of business at Toppenish, Wash., as a witness; and therefore the plaintiff is entitled, under section 850, Rev. St. (U. S. Comp. St., 1901, p. 655), to have included in the judgment against the defendant his necessary expenses in going and returning and attendance on the court, regardless of the distance traveled by him. *United States v. Sanborn*, 135 U. S., 271, 10 Sup. Ct., 812, 34 L. Ed., 112; *United States v. National Security Co. (D. C.)*, 168 Fed., 314.

The costs in the two cases referred to will be taxed in accordance with the rules above stated.

(September 13, 1909.)



Issued February 18, 1910.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 29.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Opinion of Holland, J., of the District Court of the United States for the Eastern District of Pennsylvania in overruling demurrer of defendant to information filed by the United States Attorney charging a violation of the Food and Drugs Act of June 30, 1906.

SYLLABUS OF THE OPINION.^a

1. Section 9 of the Food and Drugs Act of June 30, 1906, providing that no dealer shall be prosecuted under the act when he can establish a guaranty from the person from whom he purchased articles of food to the effect that they are not adulterated or misbranded within the meaning of the act, and providing a punishment for the person by whom the guaranty is given, is essential to the execution of the power in Congress to exclude from interstate commerce adulterated and misbranded foods, and is constitutional.

2. The Food and Drugs Act of June 30, 1906, is intended to prevent adulterated and misbranded foods from being sold in interstate commerce, and, in order that this may be accomplished, section 9 of the act prohibits the party who makes or manufactures the food, or who knows what it contains, from falsely assuring an innocent purchaser that its quality and dress lawfully entitle him to sell it in interstate commerce.

3. A guaranty made under the provisions of section 9 of the Food and Drugs Act of June 30, 1906, if false, can be made with no other purpose than to defeat the object of the act.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA	} March Sessions, 1909.
v.	
CHARLES L. HEINLE SPECIALTY COMPANY.	

OVERRULING DEMURRER.

HOLLAND, D. J.

This is a demurrer filed by the defendant to an information lodged against it by the District Attorney for the Eastern District of Penn-

^a Not by the court.

sylvania for having sold an adulterated and misbranded article of food manufactured by it and in violation of the Ninth Section of the Pure Food Act of June 30th, 1906, executed and delivered a false guaranty to the effect that the merchandise sold was not adulterated or misbranded within the meaning of the Act. The dealer to whom this adulterated and misbranded food was sold by the defendant and to whom the false guaranty was given, sold the same in interstate commerce, and upon the discovery by the Government officials that the article was misbranded, it is alleged the dealer who sold the same in interstate commerce established the guaranty of the defendant; whereupon this information was filed.

The defendant's demurrer alleges that the information sets forth no charge or offence for which the defendant can be convicted and punished under the Act of Congress, approved June 30th, 1906, because the Ninth Section, upon which the information is based, is unconstitutional. Under the Second Section of this Act the introduction into interstate commerce of adulterated or misbranded foods is prohibited, and any person violating this provision is guilty of a misdemeanor; subject to certain fines and penalties.

The Ninth Section is as follows:

"That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer or other party residing in the United States from whom he purchased such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty to afford protection shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties which would attach in due course, to the dealer under the provisions of this Act."

The defendant in this case is charged in the information with having executed and delivered to the dealer who sold the adulterated and misbranded food in interstate commerce the following guaranty, which is alleged to be false:

"We, the vendors of the articles mentioned in the foregoing invoice, hereby guarantee and warrant the same to be in full conformity with the Federal Act of June 30th, 1906, known as the 'Food and Drug Act,' * * * in that the said articles are not adulterated or misbranded within the meaning of * * * the aforesaid Act of Congress."

It is not contended by the defendant that Congress has no constitutional right to prohibit the introduction of adulterated and misbranded foods in interstate commerce, but the claim is that so far as the defendant's connection with the adulterated and misbranded goods was concerned, the entire transaction of manufactur-

ing, selling and delivering by it was consummated within the State, as was the issuance of the false certificate, and as the defendant's connection with the article was entirely within the State, the fact that the certificate indicates that the adulterated and misbranded commodity was intended for interstate commerce can make no difference, because the Federal Courts could have no jurisdiction, whatever the intention of the manufacturer might be, until such goods had been shipped or entered with a common carrier for transportation to another State, or had been started upon such transportation in a continuous route or journey; and cites *Kidd v. Pierson*, 128 U. S. 1.

There is nothing in the Act to indicate that there is an effort on the part of Congress to regulate the manufacturing, selling or delivering of any articles of food within the states. The Act is intended to prevent adulterated and misbranded foods from being sold in interstate commerce; nothing more, and in order that this may be accomplished it prohibits the party who makes or manufactures the food and who knows what it contains from falsely assuring an innocent purchaser that its quality and dress lawfully entitles him to sell the commodity in interstate commerce. Such a certificate, made by a defendant, expressly under the provisions of the Act, if false, could have been made with no purpose other than to defeat the object of the Act. This prohibition is obviously essential to the enforcement of one of the important powers with which Congress is intrusted, to wit: the regulation of interstate commerce.

To punish the dealer who sells the article in another State will not in all cases reach the evil sought to be remedied. He may be entirely innocent of any intention of selling an adulterated or misbranded food, because he may be unable to tell the difference between a pure article and one adulterated, and dealers cannot be expected to employ expert chemists to examine the great variety of commodities which enter into commerce and are dealt in by them; but the evil can soon be cured if the innocent dealer may shift the responsibility for the purity of the commodity to the manufacturer by requiring him to certify to the effect that the article is not adulterated or misbranded, when the manufacturer knows he will be subjected to punishment in case he gives a false certificate prohibited by the Act.

In the case of *United States vs. Fox*, 95 U. S., 670, 24 Law Ed., 538, in passing upon the provision in the bankrupt law which made it a misdemeanor, punishable by imprisonment, for obtaining goods under false pretence with intent to defraud, within three months of the commencement of bankruptcy proceedings, the court held that as this would be no offence under the Act of Congress at the time of the commission of the false pretence, that any subsequent independent act by the party himself or a third party in instituting bankruptcy

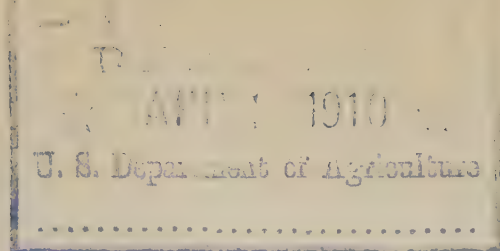
proceedings, could not make it a crime punishable in the Federal Courts. In the discussion of the question, it was said by Justice Field, that "the criminal intent essential to the commission of a public offence must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offence, one act auxiliary to another in carrying out the criminal design."

In this case, the criminal intent essential to the commission of the offence existed at the time defendant gave the certificate specifying that it was under the Pure Food Act of Congress of June 30th, 1906. With what purpose and intent was the certificate given other than for the purpose of evading the provisions of this Act of Congress? It is averred defendant made and knew the goods were both adulterated and misbranded, and with this knowledge gave a certificate that they were not adulterated or misbranded in order that an innocent purchaser might sell them in interstate commerce, and, in this case, the purpose of the certificate was accomplished. The dealer did just what the defendant intended he should do, that is, the dealer relying on the certificate sold the articles in another state. "Any act committed with a view of evading the legislation of Congress, passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offence against the United States." *U. S. vs. Fox, supra.*

Demurrer overruled.

[Cir. 29]

O



Issued April 11, 1910.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 30.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of Judge Charles E. Wolverton in the District of Oregon, in case involving violation of the Twenty-Eight Hour Law (Act of June 29, 1906, 34 Stat., 607).

SYLLABUS.^a

1. It is contended that the Terminal Company is not a connecting carrier; *Held* that such Terminal Company is a connecting carrier.

2. It is contended that the Terminal Company should not be held liable to pay the penalty, because the Spokane, Portland and Seattle Railway Company has heretofore been prosecuted, and paid the penalty; *Held* that each individual carrier which violates the law is liable to the penalty.

3. The question presented whether or not the switching at the terminal yards would be considered a part of the loading and unloading of this stock; *Held* that section 2 does not enlarge the time which is given under the first section for loading and unloading, that the switching of the animals from one track to the other about the switching yards should not be deducted from the time of carriage, but simply that space of time that would be required in putting the animals aboard the car, and in unloading them when it is necessary to unload them—that time shall not be included in the time of carriage.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF OREGON.

UNITED STATES	}
v.	
NORTHERN PACIFIC TERMINAL COMPANY.	

COURT: The court will decide the motion which was made for an instructed verdict in this case. There are three questions raised upon the part of the defendant:

1. It is contended that the Terminal Company is not a connecting carrier.

2. That the Terminal Company should not be held liable to pay the penalty, because the Spokane, Portland & Seattle Railway Company has heretofore been prosecuted, and paid the penalty; and,

^a Not by the court.

3. The question is presented whether or not the switching at the terminal yards would be considered a part of the loading and unloading of this stock.

It has been held by this court with reference to the Safety Appliance Act that the Terminal Company is a connecting carrier, and that it should be held liable where it has violated the terms of the Safety Appliance Act. That was held in *United States v. The Northern Pacific Terminal Company*.

The Attorney General has passed upon the question in an opinion delivered at the solicitation of the Department of Agriculture, in which he says:

“ I concur in this interpretation of the law, and upon the facts stated it is my opinion that the law applies to these terminal railroad companies.

“ The statute is unambiguous, and is clearly designed to prevent any ‘ railroad company within the United States whose railroad forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another,’ from transporting such animals under conditions other than those set forth in the statute.

“ It seems to be clear from your statement of the facts that these terminal companies accept stock for transportation to the National Stock Yards that has already been confined for more than twenty-eight consecutive hours without unloading for feed, rest, and water. That being so, the companies are undoubtedly liable for the penalty which the statute provides.”

So, I think, in this case that, although the Terminal Company did carry this stock but a short distance, it ought to be considered, and will be considered, as a connecting carrier with any other railroad company coming into Portland, and through and by reason of its aid taking stock up delivered to it by other companies centering here, and carried upon delivery to another company, or delivered to the Union Stock Yards. And thus I hold that as to the first point, this is a connecting carrier. The same thing is held by Judge McPherson in the case of *United States v. The St. J. & Co.*

The next question—Can the Terminal Company be held liable when it appears that the Spokane, Portland & Seattle Railroad Company has been prosecuted, and has paid the penalty, for carrying this stock? One case has been presented here, which is the case of the *United States v. The Stock Yard Terminal Company*, which holds in effect that, when one company has violated the law by carrying the stock for twenty-eight hours, or with consent thirty-six hours or more, and then has been prosecuted and paid the fine, no other prosecution can be had unless some other company has taken up the stock and carried it for twenty-eight or thirty-six hours, as the case might be, subsequent to that time. I am not in accord with that view of

the case. It seems to me that this statute is a remedial statute. It was adopted for humane purposes, and it was to prevent the wrongful treatment of stock. Furthermore, it was adopted for the purpose of preserving cattle in good order for future purposes; and the purpose is to prevent the carrying of stock or the abuse of it in that way. So that it is criminal in its nature. Yet, in order to enforce the law, the act has given a right of action which is civil in its nature; and whoever violates the law, whether one or more, each individual carrier is liable for the penalty prescribed. Suppose, for instance, the Oregon Short Line, in carrying stock from East to Huntington, has been carrying the carload of stock more than twenty-eight hours before it reached Huntington, the company would then be liable; next, suppose the O. R. & N. takes the stock up at Huntington, and carries it on to Pendleton, less than twenty-eight hours from Huntington to Pendleton, but knowing that the stock had been in continuous travel more than forty-eight hours, then the question comes up, would both railroad companies be liable? I think they would, unmistakably; because the latter company takes the stock and carries it on while it has been in confinement more than twenty-eight hours, or thirty-six hours, as the case may be. That would make it liable along with the O. S. L. Company. I think that both in that instance would be subject to fine and penalty, and the action would lie against either one or both. And so in this case it is true that, if the defendant company, being a connecting carrier, as I conclude, knowingly took up the stock and carried it on to its destination, having knowledge that it had already been carried more than thirty-six hours, it would be liable, notwithstanding the Spokane, Portland & Seattle Railway Company had already been prosecuted for the same cause. Each individual carrier which violates the law is liable to the penalty. That is my construction of the law.

The other point depends upon the construction of the statute. The first section of the statute provides that no railroad company "whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory * * * into or through another State or Territory * * * shall confine the same in cars * * * for a longer period than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding," etc. "Provided, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the

time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated." Now, section 2 provides:

"That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company," etc. "at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company * * * shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this Act."

Now, I think that that section 2 was enacted for the purpose of the protection of the railroad company. That is, in default of the owner of the animals appearing to feed them or take care of them while at rest, the railroad company might take care of them itself; or it should take care of them, and in that case it should have a lien upon the animals for the expense in taking care of the stock. Then it provides that, in so taking care of them, so unloading them, and so complying with this law, the railroad company shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of the act. So that when the railroad company has unloaded the stock in order to comply with the provisions of the act, and kept them at rest for the time fixed by the act, it shall not be liable for that detention to the shipper. And I think that that is what this section means. I do not think it has relation to the time consumed in loading and unloading the stock as being the time not to be included in the time of carriage. And I construe section 2 as not enlarging the time which is given under the first section for loading and unloading. And it does not seem to me that the switching of the animals from one track to the other about the switching yards should be deducted from the time of carriage; but simply that space of time that would be required in putting the animals aboard the car, and in unloading them when it is necessary to unload them—that time shall not be included in the time of carriage.

I will, therefore, overrule the motion for a directed verdict.

PORTLAND, OREGON, *December 21, 1909.*

[Cir. 30]

O

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 31.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW,

Notice of decision of the Supreme Court of the United States affirming the judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the cases of *United States v. The Baltimore & Ohio Southwestern Railroad Company* involving violations of the act of June 29, 1906, commonly known as "The Twenty-Eight Hour Law."

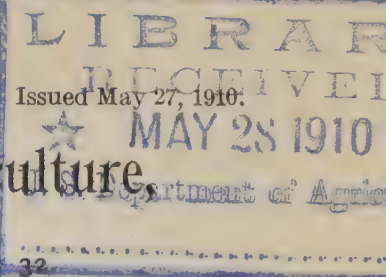
These were originally two suits by the United States against The Baltimore & Ohio Southwestern Railroad Company in the District Court of the United States for the Southern District of Ohio for recovery of penalties prescribed by the act of June 29, 1906, commonly called "The Twenty-Eight Hour Law," for confinement of cattle in cars longer than permitted by the act. The complaint in each suit contained several causes of action based upon separate and distinct shipments of live stock in the same train, from different consignors. The defendant by its answers admitted all the material allegations of the complaints, but averred that the several shipments in each train constituted but one offence in respect to that train. On the filing of these answers the defendant moved that the several causes of action be consolidated "in order that there may be a recovery of but one penalty for all the shipments." The motion was allowed, and the United States attorney moved for judgment for a separate penalty on each count of the complaints "for the reason that each of said causes should be treated as a different cause of action and a separate penalty assessed in each." This motion was overruled, and in one of the suits the court entered the following judgment:

"The court, being fully advised in the premises, finds that the defendant herein admits its liability in this cause, and therefore doth hereby order and adjudge that said defendant pay to the plaintiff herein the sum of one hundred dollars and its costs herein expended, and in default of payment execution shall issue, and the court does order, adjudge and decree that the within foregoing order in cause number 1866, shall apply to, operate upon, and be conclusive of the right of the plaintiff to recover of the defendant in each of the following causes, to-wit: 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884."

A similar judgment was entered in the other suit.

From these judgments the United States sued out a writ of error to the Circuit Court of Appeals for the Sixth Circuit, where, on February 4, 1908, the judgments of the District Court were reversed, the court holding that each separate shipment in a train constituted a separate and independent offence, and the penalty prescribed by the statute recoverable as to each (159 Fed., 33; Circular No. 2, Office of the Solicitor, U. S. Department of Agriculture). Subsequently the railroad company petitioned the Circuit Court of Appeals for a rehearing on the ground that the court had no jurisdiction of the cases in that the suits were, in effect, criminal cases, from an adverse decision in which the United States was not entitled to a writ of error, and asked that the writ of error be dismissed. The petition was denied, the court holding that the act of June 29, 1906, is not a criminal statute, and that from an adverse decision in suits based thereon the United States are entitled to a writ of error (159 Fed., 38; Circular No. 3, Office of the Solicitor, U. S. Department of Agriculture). From this judgment of the Circuit Court of Appeals the railroad company sued out a writ of error to the Supreme Court of the United States, where on March 14, 1910, the decision of the Circuit Court of Appeals was affirmed, the eight Justices then sitting being evenly divided in opinion. No opinion on the merits was delivered.

On April 4, 1910, the motion of the railroad company for a rehearing was granted, and the cases have been set for reargument during the month of October, 1910.



United States Department of Agriculture

OFFICE OF THE SOLICITOR—Circular No. 32

GEO. P. McCABE, Solicitor.

RAILROAD RIGHT OF WAY ACT. (MARCH 3, 1875; 18 STAT., 482.)

SYLLABUS.^a

1. Suit in equity to enforce the execution, by an applicant, under the Act of March 3, 1875, (18 Stat., 482) of a stipulation required by the Secretary of Agriculture and the Secretary of the Interior, in connection with a right of way sought to be acquired through lands reserved for National Forest purposes, or to restrain a continuous trespass committed by the operation of defendant's railroad thereon; *Held*, That upon the cause stated in the bill, the United States is entitled to equitable relief.

THE UNITED STATES OF AMERICA *v.* CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY OF IDAHO.

(Circuit Court, N. D. Idaho—February 12, 1910.)

Suit in equity—on demurrer to the bill of complaint—The facts recited in the bill are as follows:

On March 21, 1905, the Secretary of the Interior, in pursuance of the Acts of March 3, 1891, (26 Stat., 1103) and June 4, 1897, (30 Stat., 34), withdrew from sale and disposal (except under the mineral laws) certain public lands of the United States in Idaho, pending their proposed inclusion in a National Forest. On October 23, 1906, the Chicago, Milwaukee and St. Paul Railway Company of Idaho, filed in the U. S. Land Office at Coeur d'Alene, Idaho, under the Act of March 3, 1875, a map or profile of a proposed right of way for a railroad over said lands. Before the approval of this map, and before commencement of any construction of the railroad by the Company, the said lands (except for a few minor omissions) were set aside as the Coeur d'Alene National Forest by proclamation of the President, dated November 6, 1906. On March 20, 1907, the Company filed a second or amended map and profile of a right of way for a railroad over said lands describing a different route from that described in the first map, and received its first map in return without approval of the Secretary of the Interior. On May 10, 1907, likewise a third or amended map was filed, whereupon the second map was returned to the Company without approval.

^a Not by the court.

The Company, desiring to commence construction of its road before approval of its map by the Secretary of the Interior, was upon its application to the Forester dated May 10, 1907, granted permission to do so, in consideration of which the Company's general counsel signed an instrument in writing agreeing on behalf of the Company that it would "execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the Company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana."

The stipulations and conditions referred to were those required by a regulation of the Secretary of the Interior promulgated February 11, 1904, amended April 25, 1906, (32 L. D. 481; 34 L. D. 583) as follows:

"Whenever a right of way is located upon a forest or timberland reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserves."

Immediately after the execution of this instrument by its general counsel, the company entered upon the Coeur d'Alene National Forest, and commenced the construction of a railroad over the lands described in its third map. The work of constructing the railroad was continuously carried on up to December 3, 1907, when the Company through its general counsel notified the Forester verbally, and for the first time, that it would not execute or file any stipulation whatever:

Meanwhile, the Forest Service presented to the Company for execution a stipulation prescribed by the Secretary of Agriculture in accordance with the terms of the instrument executed by the Company's general counsel on May 10, 1907.

This the Company refused to execute, whereupon the Secretary of the Interior notified the Company that as a condition precedent to his approval of the Company's map filed May 10, 1907, it must comply with such requirements of the Secretary of Agriculture. Upon further refusal of the Company to execute the stipulation, on October 10, 1908, the Secretary of the Interior, upon consideration of its terms decided that the public interests would be injuriously affected unless it was executed and filed and complied with by the Company, and notified the Company that unless said stipulation was executed and filed within fifteen days from October 10, 1908, its maps would be rejected and stricken from the files of the Department of the Interior. Upon the failure of the Company to comply with this notice, the Secretary of the Interior on October 29, 1908, rejected the Company's maps, struck them from the files of the Interior Department and returned them to the Company.

It was further alleged that the Company, having continuously since May 10, 1907, been constructing and operating a railroad over the land described in its third map, did in the course of its operations cut and destroy a large amount of timber from the strip which it sought to acquire as a right of way, also from an additional strip on the uphill side thereof adjoining; caused to be set numerous fires which ran over lands of the plaintiff and destroyed thereon large amounts of mature and immature timber; and by blasting out the mountain side for its road bed, caused large masses of rock to be thrown into the St. Joseph River, obstructing it in several places and rendering it useless for the purposes of navigation and log driving. All of these items of damage were expressly provided for in the stipulation prescribed by the Secretary of Agriculture which the Company agreed to execute and abide by.

The bill prays primarily for a decree for specific performance of the agreement of May 10, 1907, to execute the stipulations prescribed by the Secretary of Agriculture, and as incidental to this relief, that the damages due under the terms of the stipulation be awarded; or in the alternative that the Company be restrained from committing a continuous trespass upon the lands of the plaintiffs, and for damages as incidental thereto.

The defendants took numerous exceptions to the bill for impertinence and demurred thereto on the grounds that the plaintiff has no interest in the matter of obstruction of the St. Joseph River, but the defendant is answerable therefor to the State of Idaho; that the plaintiff has adequate remedy at law for the alleged damage by fire to timber on the plaintiff's land along the pretended right of way; that there is no equity in so much of the bill as charges the defendant with cutting the timber from the pretended right of way, or from the additional strip on the uphill side thereof adjoining, or in any part of said bill; and that the bill is multifarious.

DIETRICH, *District Judge*:

Upon consideration it is decided that the bill exhibits facts sufficient to entitle the complainant to equitable relief; and upon the whole it is thought proper to deny both the objections interposed by the demurrer and those raised by the exceptions for impertinence to certain portions of the bill as involving claims cognizable at law, with the understanding that unless some other course shall be agreed upon a hearing will first be had upon such issues as relate strictly to the prayer for equitable relief, and that thereupon, if complainant prevails, it be determined whether the other issues shall be here tried out or as to them the complainant be remitted to its remedies at law.

Orders will therefore be entered denying both the demurrer and the exceptions to the bill.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 33.

GEO. P. McCABE, Solicitor.

RECORDED
JUN 28 1910
U. S. Department of Agriculture

THE TWENTY-EGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Eighth Circuit, affirming the decision of the Circuit Court of the United States for the District of Minnesota, in a case arising under the Twenty-Eight Hour Law. (Act of June 29, 1910; 34 Stat., 607).^a

SYLLABUS.^b

1. Under the Twenty-eight Hour Law, a defendant, a terminal company, does not knowingly and willfully violate the Act, when it receives live stock for the sole purpose of feeding, resting and watering them, without having actual knowledge that they had been confined in cars exceeding the time allowed by statute, and having used due diligence in carrying them to the stock yards and unloading them.

2. The court does not pass on the question of whether such defendant could not be held liable in any case, simply because a shipment was not billed over its line, and because its line did not form part of a connecting line to be used in forwarding cattle.

3. *United States v. New York Central & Hudson River R. R. Co.*, 156 Fed., 249, distinguished.

4. *United States v. Union Pacific R. R. Co.*, 169 Fed., 68, and *St. Louis & San Francisco Railroad Company v. United States*, 169 Fed., 71, applied.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 3165.—December Term, A. D. 1909.

UNITED STATES OF AMERICA, <i>Plaintiff in</i>	} In Error to the Circuit Court of the United States for the Dis- trict of Minnesota.
<i>Error,</i>	
<i>vs.</i>	
STOCK YARDS TERMINAL RAILWAY COM- PANY, <i>Defendant in Error.</i>	

Mr. Charles C. Houpt, United States Attorney, for plaintiff in error.

Mr. Robert E. Olds (Mr. Frank B. Kellogg, Mr. C. A. Severance, Mr. Henry Veeder, with him on the brief), for the defendant in error.

Before SANBORN and ADAMS, *Circuit Judges*, and RINER, *District Judge*.

RINER, *District Judge*, delivered the opinion of the court.

This was an action brought by the United States against the defendant to recover a penalty for an alleged failure to comply with

^a For decision of lower court see Circular No. 26, Office of the Solicitor.

^b Not by the court.

the provisions of Section One of the Act of Congress of June 29, 1906, known as the twenty-eight hour law. The parties are arranged in this court as they were in the Court below, the plaintiff in error being the plaintiff, and the defendant in error being the defendant, and they will be hereafter referred to as plaintiff and defendant, respectively.

The petition originally contained two causes of action, but before the trial the second cause of action was dismissed by the plaintiff. A jury was waived by a stipulation in writing, and the case was tried by the Court without the intervention of a jury, upon the following agreed statement of facts:

"It is hereby stipulated by and between the parties to the above entitled cause that the same may be tried by the Court without a jury, on the following facts without other or further proof:

"1. The defendant Stockyards Terminal Railway Company is, and during all of the times mentioned in the complaint, was a corporation duly organized and existing under the general laws of the State of Minnesota relating to the incorporation of railroad companies. The said defendant during all of said times operated a line of road from Dayton's Bluff, a point at the southern extremity of the Union Depot Yards in St. Paul, Minnesota, to the yards of the St. Paul Union Stockyards Company at South St. Paul, Minnesota. The said defendant does not own its own line, but under contract of lease operates over the main line tracks of the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, Burlington & Quincy Railroad Company from the said Dayton's Bluff to Newport and St. Paul Park, whence it crosses the Mississippi River, using the tracks and bridge of the Chicago, Rock Island & Pacific Railway Company to Inver Grove in Dakota County, Minnesota, and thence uses the tracks of the Chicago, Rock Island & Pacific Railway Company to the St. Paul Union Stockyards at South St. Paul, Minnesota. The total distance by the route above described from Dayton's Bluff to the said Union Stockyards is about eleven miles, and the greater part thereof, that is to say, from Dayton's Bluff to the point crossing the Mississippi River, is over the tracks of the Chicago, Burlington & Quincy Railway Company and the Chicago, Milwaukee & St. Paul Railway Company, which constitute the main lines of said companies respectively between St. Paul, Minnesota, and Chicago, Illinois.

"2. The shipment involved in the first cause of action set forth in the complaint herein was delivered to the defendant at the said Dayton's Bluff solely for the purpose of being transported to the said St. Paul Union Stockyards at South St. Paul, for feeding, watering and resting the stock. The shipment consisted of five carloads of cattle, all shipped by the same consignor to the same consignee. The shipment was billed from Lavina, Montana, to the Union Stockyards at Chicago, Illinois, by way of the Chicago, Milwaukee & St. Paul Railway. The said shipment was not billed via the defendant's line, and the defendant did not perform any other service with respect thereto than that of transporting the same from the main line tracks of the said Chicago, Milwaukee & St. Paul Railway Company at or near said Dayton's Bluff to the said St. Paul Union Stockyards

for the purpose of feeding, watering and resting the stock, and thence back again to said main line tracks of said Chicago, Milwaukee & St. Paul Railway after the cattle comprised in the said shipment had been rested, watered and fed at said St. Paul Union Stockyards. Hereto attached marked 'Exhibit A,' and consisting of five sheets, are the original waybills covering the said shipment, each of said waybills relating to one of the five carloads mentioned.

"The defendant at none of the times mentioned in the complaint herein had any knowledge or information concerning the shipment involved in the said first cause of action other than that contained in the said waybills hereto attached and marked 'Exhibit A.' The said waybills were delivered to the defendant simultaneously with the cars to which they related. The usual 36-hour release was attached to each of said waybills.

"It is customary for live stock to arrive at St. Paul from western points in the early morning hours. Between the hours of one o'clock A. M. and 8:30 A. M. of August 3, 1908, 119 carloads of live stock were delivered to the defendant company at said Dayton's Bluff for transportation to the said St. Paul Union Stockyards at South St. Paul, Minn., and at the time when the five cars referred to in Exhibit A were delivered to the defendant, to-wit: at 6:35 A. M. on said August 3, 1908, there were delivered to the defendant at said Dayton's Bluff for transportation as aforesaid altogether 67 carloads of live stock, together with the waybills therefor.

"It is customary in transporting live stock for the agents of the railway companies engaged in such transportation, and it is their duty, to note and enter upon the waybills the times and places of feeding, resting and watering the live stock, together with the charges therefor; but this practice is not invariable, and sometimes said agents do not make such notations or entries on the waybills, and frequently the feeding charges incurred at points where the stock is fed, rested and watered, are entered upon a separate bill which may or may not be attached to the original waybill covering the shipment to which it relates.

"3. The defendant did not have actual knowledge at any of the times mentioned in said complaint, that the cattle comprised in the said shipment had been confined without unloading them for the purpose of rest, water and feeding, for a period in excess of 28 hours or a period in excess of 36 hours, or any other period of time contrary to law.

"4. The facts with respect to the hours of delivery to and unloading by the defendant company are as follows: The said five cars were delivered to the defendant by the Chicago, Milwaukee & St. Paul Railway Company at said Dayton's Bluff at 6:35 A. M. on August 3, 1908, and were unloaded at the St. Paul Union Stockyards at 8:40 A. M. on said August 3, 1908. The period of time consumed by the defendant in transporting said shipment of five cars from said Dayton's Bluff to the said St. Paul Union Stockyards at South St. Paul, and unloading the same was reasonable, and not longer than was necessary for the transportation of said live stock between the points named, and the unloading of the same.

"5. The said St. Paul Union Stockyards at South St. Paul, Minn., are the nearest yards and most accessible facilities for unloading, resting, feeding and watering live stock, to said Dayton's Bluff, the

point of delivery of said shipment to the defendant, and if the said shipment had been declined by the defendant, or turned back to the Chicago, Milwaukee & St. Paul Railway Company, at said Dayton's Bluff, it would have been necessary to transport the same to other and more distant yards, and the time consumed in so transporting the said shipment to other yards would have been greater than that actually consumed by the defendant in transporting the same to said St. Paul Union Stockyards.

"6. At the same time that this action was begun by the plaintiff against the defendant on account of the matters set forth in the first cause of action in the complaint herein, a similar action was begun by the same plaintiff against the Chicago, Milwaukee & St. Paul Railway Company on a cause of action identical with the first cause of action in the complaint herein, in that it related to the same shipment and the same alleged violation of law; and in the said action against the Chicago, Milwaukee & St. Paul Railway Company, that company conceded the truth of the allegation in the complaint against it, said allegations being identical in substance with those in the first cause of action in the complaint herein, whereupon said Chicago, Milwaukee & St. Paul Railway Company was by this court duly fined in the sum of \$250, and judgment was entered against said company for said sum. The said fine and judgment have been paid and satisfied by said Chicago, Milwaukee & St. Paul Railway Company."

We do not think the case of the *United States v. New York Central & Hudson River Railroad Company*, 156 Fed. 249, sustains the contention of the plaintiff. In that case a car of horses was shipped from Peru, Indiana, over the Wabash Railroad Company's lines through the States of Ohio and Michigan, and thence through the province of Ontario, Canada, to the city of Buffalo, in the State of New York, where they were delivered to the defendant, a connecting carrier. The court, in the course of its opinion, said: "I am cited no authority by either side, and I have found none bearing upon the precise question involved, but I think that, as the horses were kept on cars by the defendant railroad company about three or four hours after the expiration of 28 consecutive hours before they were rested and fed, it is liable for negligence *per se*."

The case was presented to the court upon a demurrer to the complaint, and the court held that whether the defendant knowingly or willfully failed to meet the requirements of the statute was a question to be submitted to a jury.

It is to be noticed in the case now before us, that the shipment of the five cars of cattle, the subject of this controversy, was billed from Lavina, Montana, to the Union Stockyards in Chicago, Illinois, by way of the Chicago, Milwaukee & St. Paul Railway Company; that the shipment was not billed over the defendant's line, or any part of it; that the defendant did not perform any service with respect to the cattle, other than that of transporting them from the line of the Chicago, Milwaukee & St. Paul Railway Company at Dayton's Bluff to

the St. Paul Union Stockyards, a distance of about eleven miles; that it received and transported them over its line of road only for the purpose of feeding, watering and resting the stock, and after that had been done, it returned them again to the lines and tracks of the Chicago, Milwaukee & St. Paul Railway Company to be forwarded on by that company to their destination. It is also admitted that it used all due diligence in handling the cattle while they were in its possession.

In response to a question by a member of the court, during the argument, plaintiff's counsel was obliged to admit that if the defendant had refused to receive the cattle for the only purposes for which it did receive them, viz., feeding, watering and resting them, such refusal would have placed the Milwaukee Railway Company in a position where it would either have to turn the cattle loose or let them remain in the cars to starve. This, it seems to us, would be an unwarranted and unreasonable construction of the statute, and, if sustained, would tend to defeat the very purpose for which it was enacted.

The real purpose of the legislation, as stated by Judge Adams, in *United States v. Union Pacific Railroad Company*, 169 Fed. 68, "was to alleviate the condition of dumb animals in transit."

We do not wish to be understood as deciding that the defendant could not be held liable in any case, simply because a shipment was not billed over its line, or because its line did not form a part of a connecting line to be used in forwarding the cattle. It might be, where it clearly appeared that the failure to deliver the stock at the place where it was to be unloaded for the purpose of feeding, watering and resting within the statutory period, was due to unnecessary delay in transporting the stock over its line, it would be liable under the statute, but as no such question arises in this case we do not decide the point.

The agreed statement of facts shows that the defendant did not have actual knowledge, during the time the cattle comprising this shipment were in its possession, that they had been confined without unloading them for the purposes of rest, water and feeding for a period in excess of 28 hours, or in excess of 36 hours, or any other period of time contrary to the requirements of the statute. Section 3 of the statute makes a carrier liable for the penalty for violating Sections 1 and 2 of the Act only, when it knowingly and willfully fails to comply with the provisions of those sections. These qualifying words cannot be disregarded. In *St. Louis & San Francisco Railroad Company v. United States*, 169 Fed. 71, Judge Van Devanter, referring to the words "knowingly and willfully," in this section of the statute, said: "They mean something, and whatever that may be is an essential element to every right to the penalty. 'Knowingly'

evidently means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as is the case where one carrier receives from another a car loaded with cattle, and, with knowledge of how long they then had been confined in the car without rest, water or food, prolongs the confinement until the statutory limit is exceeded. 'Wilfully' means something not expressed by 'knowingly,' else both would not be used conjunctively. * * * But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. * * * So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.'"

See also *United States v. Union Pacific Railroad Company, supra*, to the same effect.

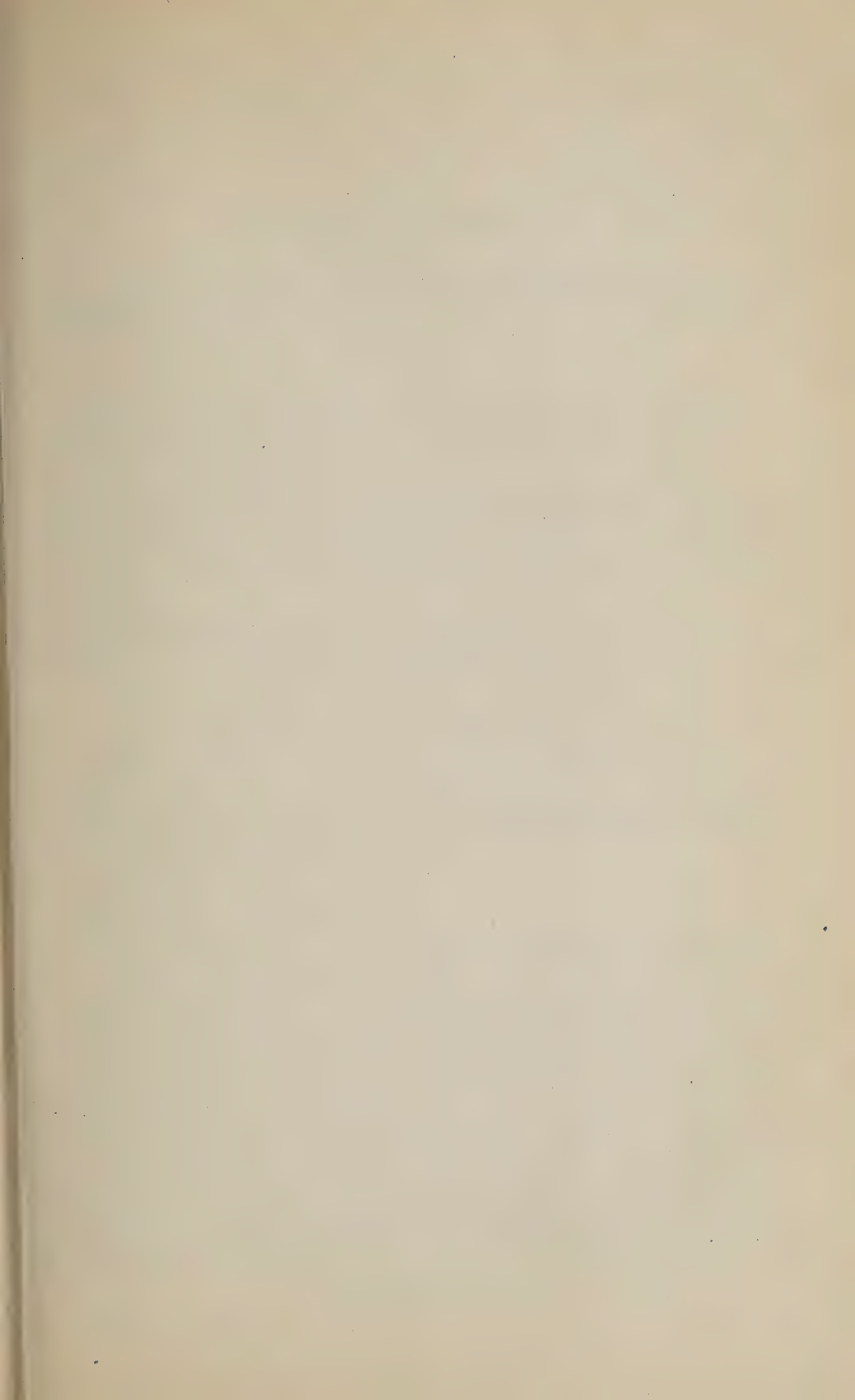
The defendant having received the cattle for the sole purpose of feeding, watering and resting them, without knowing that they had been confined in the cars exceeding the time allowed by the statute, and having used due diligence in carrying them to the stockyards and unloading them, we do not think it can be said that it either intentionally disregarded the statute or was plainly indifferent to its requirements, and the judgment must be *affirmed*.

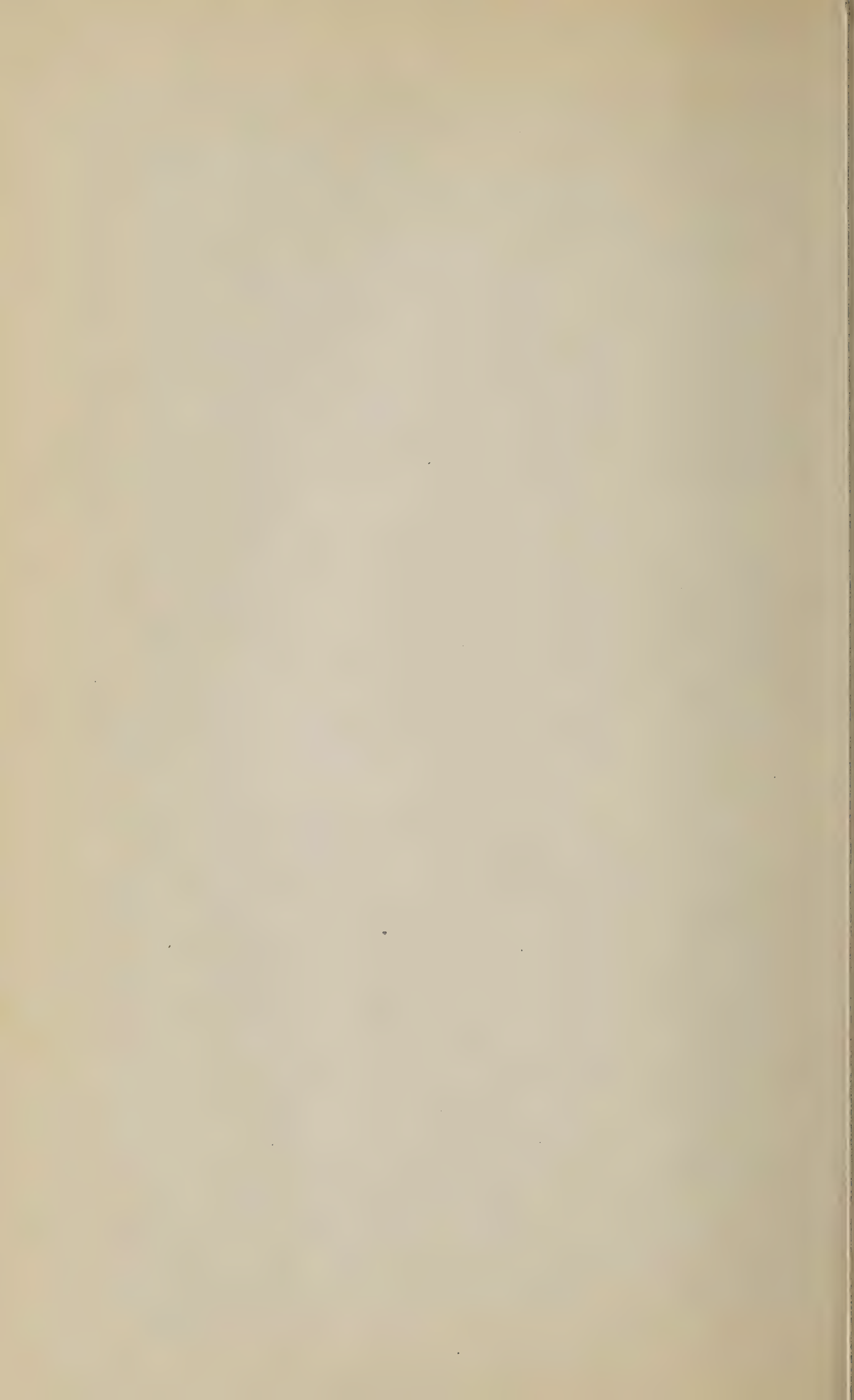
Filed March 23, 1910.

SANBORN, *Circuit Judge*, concurring.

I concur in the affirmance of the judgment in this case on the ground that, conceding that the defendant knew that the St. Paul Railway Company had confined the cattle more than 36 hours when it delivered them to the defendant, yet the latter was not guilty of any offense, because it did not contribute in any way to their confinement until after the statutory offense of confining them more than 36 hours had been committed and there was no second violation of the law. The violation of the statute consisted in continuing the confinement over the 36-hour limit. When that limit had been passed the offense was complete. Neither the St. Paul Company nor those to whom it delivered the cattle could commit or aid in committing that offense again and none of them could commit a second offense by prolonging the confinement of the cattle after the 36 hours unless they confined them 28 hours more. That was not done, but within 28 hours after the expiration of the 36 hours and as speedily as possible after it received the cattle the defendant released, fed and watered them. *United States v. Sioux City Stock Yards Co.*, 162 Fed. 556, 561.

Filed March 23, 1910.





United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 34.

GEO. P. McCABE, Solicitor.

JUN 28 1910

U. S. Department of Agriculture

THE CATTLE QUARANTINE LAW.

Opinion of Grubb, J., of the Northern District of Alabama, delivered in overruling a demurrer to an indictment based on the act of March 3, 1905 (33 Stat., 1264) (Reported in 176 Fed., 942).

SYLLABUS.^a

1. The act of March 3, 1905, defines the unlawful act, declares it to be a crime, and fixes the punishment; and this is completely done by the public act itself, without resort to departmental regulations.

2. The act is not equivalent to a general prohibition against all shipments, accompanied by a general permission of such shipments upon compliance with departmental rules, the effect of which would be to create a crime out of a violation of departmental rules, to be afterwards promulgated; the act contains a general prohibition, together with a limited and conditional exception, applicable as the Secretary of Agriculture may determine.

3. The act does not attempt to vest in the Secretary of Agriculture the power to determine what facts shall constitute a crime, but permits him to determine the existence of a status, to which the act itself attaches certain restrictions.

UNITED STATES *v.* LOUISVILLE & N. R. Co.

(District Court, N. D. Alabama, N. D. March 15, 1910.)

The Louisville & Nashville Railroad Company was indicted for violating the live stock quarantine act, and demurred to the indictment. Demurrer overruled.

O. D. Street, U. S. Atty.

John C. Eyster, for defendant.

GRUBB, *District Judge.* The indictment charges the defendant with a violation of Act March 3, 1905, c. 1496, 33 Stat. 1264 (U. S. Comp. St. Supp. 1909, p. 1185), providing for the establishment of live stock quarantines by the Secretary of Agriculture, and the prohibition of live stock shipments from quarantined territory in one state into another state, except when rules and regulations permitting such shipments have been established by the secretary, and then except in accordance with such rules and regulations. The demurrer to the indictment attacks the constitutionality of the law under which it is framed, upon the ground that its effect is to delegate legislative authority to the executive, and because no complete offense is defined by the terms of the statute.

^a Not by the court.

The act contains six sections. The first authorizes the secretary to quarantine any state or territory, or any portion thereof, when he has determined that live stock within it are infected with any contagious diseases, and to give notice thereof to transportation companies. The second prohibits, among other things, transportation companies from receiving for transportation or transporting from any quarantined territory in one state to another state "any cattle or live stock, except as hereinafter provided." The third section makes it the duty of the secretary, when the public safety will permit, to make and promulgate rules and regulations governing the shipment of cattle and other live stock from quarantined territory in one state to another state, and to give notice of such rules and regulations in the same way as notice of the establishment of the quarantine is required to be given. The fourth section provides that cattle and other live stock may be moved from the quarantined territory of one state to another state in compliance with the rules and regulations so established, and that it shall be unlawful to move them otherwise. The fifth section provides penalties for assaults upon officers of the quarantine service. The sixth and last section declares any one violating section 2 or 4 of the act guilty of a misdemeanor and fixes the punishment therefor.

The indictment alleges the establishment of the quarantine in Alabama by the secretary and the giving of the required notice; the establishment of regulations governing shipments from the quarantined territory to other states, and the giving notice thereof; that one of such regulations provided for the placarding of cars and waybills in cases of such live stock shipments with the words "southern cattle"; and that the defendant received live stock in Alabama and transported them to Tennessee without so placarding its waybill and cars.

A crime can be created only by a public act, and the language of the act must be sufficient to completely declare and define the crime and affix the punishment. It is not competent for Congress to delegate to the President or the head of an executive department the power to declare what facts shall constitute an offence. It is competent for Congress to commit to the executive the power to determine when the occasion, provided by the law itself for its going into effect, has occurred, and whether the facts, which the law makes conditions to its operation or to a partial or temporary suspension of its operation, exist, and also to provide for the details of the law's administration. It is not competent for Congress to intrust to the executive the power to declare by a departmental rule or regulation that to be unlawful, in the sense of criminal, which would otherwise be lawful; nor, itself, to declare a violation of rules or regulations,

thereafter to be promulgated by the executive, a criminal offense. The crime must be created by the act of Congress, alone, for the public are not required to look beyond the act in their endeavor to ascertain what is criminal, and the discretion of fixing what facts import criminality is exclusively that of the lawmaker as distinguished from the executive. The effect of departmental regulations, not ratified by act of Congress, is confined to civil matters, and cannot be made the predicate of criminal offenses. These are the principles announced by many cases in the federal courts, some of which are here cited: *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *U. S. v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; *Caha v. U. S.*, 152 U. S. 218, 14 Sup. Ct. 513, 38 L. Ed. 415; *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; *St. Louis, I. M. & S. R. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Red C. Oil Mfg. Co. v. Board of Agriculture (C. C.)* 172 Fed. 712; *Southern Pac. Co. v. U. S.*, 171 Fed. 360, 96 C. C. A. 252; *U. S. v. Grimaud (D. C.)* 170 Fed. 205; *U. S. v. Matthews (D. C.)* 146 Fed. 306; *Dastervignes v. U. S.*, 122 Fed. 30, 58 C. C. A. 346; *U. S. v. Deguirro (D. C.)* 152 Fed. 568; *U. S. v. Shannon (C. C.)* 151 Fed. 863; *U. S. v. Maid (D. C.)* 116 Fed. 650; *U. S. v. Blasingame (D. C.)* 116 Fed. 654.

The sixth section of the act in question declares the violation of section 2 and of section 4 of the act to be a misdemeanor as therein stated. Section 4 declares the transportation of live stock from a quarantined territory in one state into another state in a manner not in compliance with the shipping rules and regulations of the Department of Agriculture to be unlawful. The crime, so far as based on section 4, when considered by itself, is defined merely by rules and regulations thereafter to be established by the Department of Agriculture. In the case of *United States v. Grimaud (D. C.)* 170 Fed. 205, the validity of a law, which provided that violations of rules and regulations to be established by the Secretary of the Interior, with relation to the occupancy and use of forest reservations, should be punishable as a crime, and a regulation of the department thereunder prohibiting the grazing of sheep on such reservation, unless permitted by the secretary, was involved. The court said (page 207):

“There can be no pretense that Congress itself has defined as a crime the act for which defendants are here indicted, namely, grazing sheep, without permission, in a forest reserve. The statute itself does not forbid or make any reference whatever to sheep grazing, nor in the remotest degree suggest that Congress had it at all in mind, and, according to the government’s own theory, it did not become a crime until nine years after the passage of the statute, which the government claims made it criminal, and then only because of the

promulgation of an administrative rule which it contravenes. The mere statement of the theory, it seems to me, condemns it, and, after much reflection, I have now no hesitancy in holding that the statute, in so far as it affixes punishment to infractions of executive rules and regulations thereafter to be promulgated, is incomplete and wholly inadequate to form the basis of a criminal prosecution."

And again, on page 209, the court said:

"There can be no controversy whatever about the principle itself; the only room for dispute lies in its application. In the case at bar, the statute does not declare the grazing of sheep, without permission, to be a crime, nor does it make the slightest reference to that matter, but declares that whatever the Secretary of the Interior may thereafter prohibit shall be a misdemeanor. Congress merely prescribes a penalty, and then leaves it to the Secretary of the Interior to determine what acts shall be so punishable. Thus it will be seen that the very essence of the alleged crime, namely, what act shall constitute it, is not fixed by Congress, but wholly confided to the discretion of an administrative officer. If this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challengeable on that ground."

In the case of *U. S. v. Eaton*, 144 U. S. 677, 687, 12 Sup. Ct. 764, 767 (36 L. Ed. 591), the sufficiency of a departmental regulation, requiring the dealer to keep a record sale book and make report of sales to the Commissioner of Internal Revenue, to support a conviction under a law providing that the department should make all needful regulations to carry out the law, and that all violations of the law should be punished as offenses, was involved. The court said:

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 American & English Encyclopedia of Law, 642; 4 Bl. Com. 5.

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act. [Act Aug. 2, 1886, c. 840, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234).] * * *

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as to lawfully support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

The illegality of the act forbidden by section 4 lies in a nonconformance with department rules and regulations, and is within the influence of the decisions quoted from; and, if the indictment were based solely upon a violation of this section, the demurrer would seem to be well taken.

Section 2, however, forbids the shipment of live stock from a quarantined territory in one state to another state, "except as hereinafter provided." And a violation of section 2 is declared by section 6 to be a misdemeanor, and the punishment, as such, is fixed by that section. Section 2, in connection with section 6, accordingly defines the unlawful act, declares it to be a crime, and fixes the punishment, and this is completely done by the public act itself, without resort to departmental regulations, and is, in this respect, like that passed upon in the case of *In re Kollock*, *supra*. The shipment is declared to be unlawful, however, only, "except as hereinafter provided," and the exception is that, in the event the secretary shall deem the public safety permits, he shall establish rules and regulations, under which live stock may lawfully move from the quarantined territory of one state to another state.

If the statute, in its entirety, be so construed as to make the exception in its application as broad as the prohibition, it would amount to nothing more in substance than the fourth section alone. It would then in one section prohibit all interstate shipments from quarantined territory, and in another permit all such shipments, when made in compliance with the regulations of the department. With that construction, the violation of law must in every instance consist, not in the shipment itself, but in the failure to comply with some departmental regulation relating to it; and the criminal act, if any, created by the statute, would be in effect the violation of a regulation authorized by the act to be made, after its passage, by the department. The act, so construed, would be open to the same constitutional objection as is the fourth section taken by itself.

The exception, however, is not as broad as the prohibition. By section 2 interstate shipments from quarantined territory are forbidden, except as afterwards provided by the act. Congress legislated, having in view the probable occurrence of epidemics of varying seriousness and intensity. The epidemic to be guarded against might in some instances be so severe and the disease of so serious a character as to require the absolute cessation of shipments from the quarantined territory; while, in other instances, the mildness of the disease or the infrequency of the cases might justify continued shipments, but under precautionary measures.

In legislating on the subject, Congress could not have before it the facts relating to each epidemic to be provided for, and could not make

rules in advance to fit the exigency of each varying case as it arose. It therefore provided a general prohibition of shipments from quarantined territory, and further provided that the secretary, as each epidemic arose, should have the power, if he determined that the public safety justified it, to permit shipments for certain purposes and under certain conditions to be determined by rules and regulations to be established by him for that specific epidemic.

The act, when so construed, is not the equivalent of a general prohibition against all shipments, accompanied by a general permission of such shipments upon compliance with departmental rules, the effect of which would be to create a crime out of a violation of departmental rules to be afterwards promulgated; but contains a general prohibition, together with a limited and conditional exception, applicable only to such epidemics as are determined by the secretary to be of so mild a character as to permit of shipments under certain safeguards consistent with the public safety. The act confers on the secretary the power to determine in each epidemic (1) whether shipments can be made consistently with public safety at all; and, if so (2), upon what conditions. All epidemics, as to which the secretary fails to make this determination, are governed by the general prohibition of the statute. As to others, the secretary is invested by the act with the power conditionally to suspend the operation of the prohibition by permitting shipments for certain purposes and under certain safeguards formulated by departmental rules. Shipments which fail to comply with such rules are not excepted from the general prohibition of the statute, and become violations of the act under it. As to shipments alone which comply with the regulations of the department, the operation of the act is suspended. Having ascertained that the public safety permits conditional shipments, the secretary has no discretion to withhold permission to make them, but the terms of the act makes it his duty to grant it.

The power of Congress to commit to the President or the head of a department the authority to determine whether facts exist, upon which the operation of a provision of a law is to be suspended in a particular instance or occasion as provided in it, and thereupon to declare the operation of the law suspended in such instance, has been upheld in the case of *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294. That this is the effect of the power vested in the secretary by the act in question is plain. Section 3 provides "that it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed, when the public safety will permit, to make and promulgate rules and regulations which shall permit and govern * * * the method and manner of delivery, and shipment of cattle or other live stock from a quarantined state," etc., also to give notice

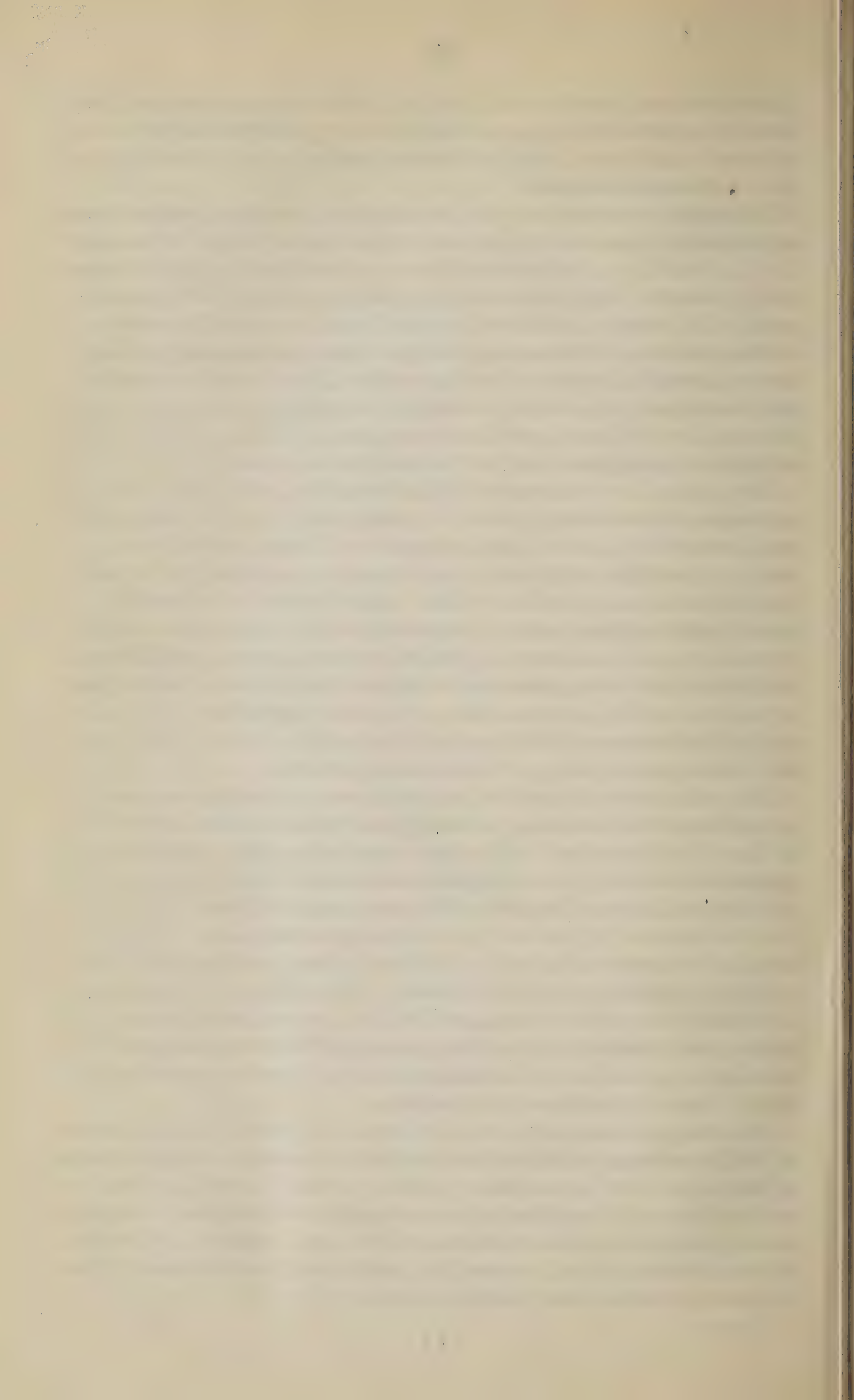
of such rules and regulations. Section 4 provides that live stock may lawfully be moved from quarantined territory in compliance with such rules and regulations, made by the secretary pursuant to section 3 of the act, but not otherwise.

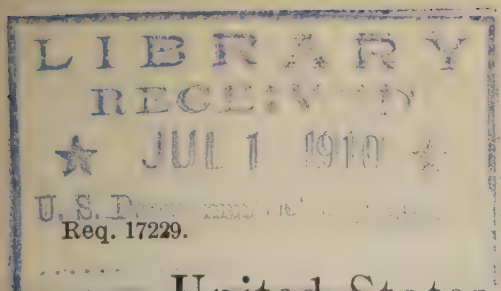
Under this construction, the statute itself, as distinguished from departmental rules and regulations, defines the act made criminal by it, viz., the shipping of live stock from a quarantined territory in one state to another state, and also fixes the punishment to be administered. The statute, therefore, in and of itself, completely creates the offense; the effect of the subsequent provisions, authorizing the secretary to permit shipments when the public safety permits, under certain conditions, constituting merely a suspensory power in specific instances, conditioned upon the observance by the shipper of certain safeguards to be prescribed by the rules of the department.

The statute, so construed, fully informs the public from its own provisions of the character of the act made criminal and of the punishment prescribed therefor, and does not vest in the executive discretion to determine what facts shall constitute a crime, or to make that unlawful and criminal which would otherwise be lawful. It merely permits the executive to determine the existence of a status, to which the act itself attaches the effect of suspending partially and temporarily its own operation, to declare the existence thereof and to execute the law, as prescribed in the act, appropriate to the existence of the status so determined and declared by him. This is properly an executive, and not a legislative, function.

The indictment alleges the establishment of the quarantine and notice thereof to defendant, personally and by publication, as required by law; that rules and regulations permitting shipments from the quarantined territory to other states were established by the secretary, of which notice was also given defendant, personally and by publication, as required by the act; that defendant received for transportation the shipment in question, without having complied with such rules and regulations or some of them. These allegations sufficiently show that the shipment came within the general prohibition of the statute, and was not relieved therefrom by a full compliance with the permissive regulations of the department, the condition upon which, alone, the exception becomes operative.

The effect of amendment No. 2 of order No. 143 of the regulations of the Department of Agriculture was only to modify the regulations of March 22, 1907, constituting original order No. 143, and not to revoke them; the modification consisting of a revocation of regulations 13 and 14, and a substitute of two new regulations therefor, leaving the regulations, as modified, still effective at the time of the shipment, of which complaint is made.





Issued July 5, 1910.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—CIRCULAR NO. 35.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Eighth Circuit, reversing the decision of the Circuit Court for the Western District of Missouri, in a case involving a violation of the Twenty-eight Hour Law (Act of June 29, 1906; 34 Stat., 607).

SYLLABUS.^a

A legal request for the confinement of live stock, under section 1 of the Twenty-eight Hour Law, may be made (1) by the authorized agent of the owner of the particular shipment; (2) such a request may be printed, engraved, or stamped and partly in handwriting; (3) a legal request may be made on or in a railroad form separate and apart from a printed bill of lading or other railroad form than one which contains the request alone; (4) such a request may be made before the transportation of the shipment commences; (5) such a request may be made although it is not induced by any emergency or contingency that arises after the transportation commences and that was unforeseen at that time.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 3048.—December Term, A. D. 1909.

WABASH RAILROAD COMPANY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

In Error to the Circuit Court of the
United States for the Western
District of Missouri.

Mr. Ben J. Woodson (Mr. James L. Minnis and Mr. N. S. Brown were with him on the brief), for Plaintiff in Error.

Mr. Robert Dunlap (Mr. Gardiner Lathrop and Mr. James L. Coleman were with him on the brief), for The Atchison, Topeka & Santa Fe Railway Company.

Mr. A. S. Van Valkenburgh (Mr. Leslie J. Lyons was with him on the brief), for Defendant in Error.

^a Not by the court.

Before SANBORN and ADAMS, *Circuit Judges*, and AMIDON, *District Judge*.

SANBORN, *Circuit Judge*, delivered the opinion of the court.

A judgment for the penalty prescribed by the Act of June 29, 1906, to prevent cruelty to animals while in transit, 34 Stat. Chap. 3594, page 607, U. S. Comp. Stat. 1901, Supp. 1907, page 918, was rendered against the Wabash Railroad Company because it confined a shipment of cattle from Kansas City, Kansas, to Elmo, Missouri, more than 28 and less than 36 hours in the face of a written request made at the time the cattle were delivered to the Company for transportation that the time of their confinement be extended to 36 hours. The Company complains because the court below which tried the case without a jury ruled this request out of the evidence and disregarded it in entering the judgment. The request was on printed form No. 148 of the Railroad Company into blanks in which the description of the cars in which the cattle were shipped was inserted in hand-writing. It was separate from any printed bill-of-lading or other railroad form and it was signed "Byers Bros. & Co." If the request was rightly rejected and disregarded for any valid reason the judgment must be affirmed and these grounds for the ruling below have been pressed upon our attention by counsel for the government in this case and in the cases of *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, — Fed. —, — C. C. A. —, and *Missouri, Kansas & Texas Ry. Co. v. United States*, — Fed. —, — C. C. A. —, which were argued and submitted at this term: (1) Byers Bros. & Co. were not the owners nor the persons in the custody of the shipment when the request was made; (2) an agent of the owner may not lawfully make such a request; (3) this was not a written request but it was partly in print and partly in manuscript; (4) it was on a railroad form; (5) it was made before the shipment started on its way; (6) it was not induced by any contingency which arose after the shipment started and was unforeseen when the shipment was made.

The Act of June 29, 1906, which conditions the decision of the questions thus presented is a substitute for the Act of March 3, 1873, 17 Stat. Chap 253, page 585, Rev. Stat. Sections 4385, 4386, 4387, 4388, 3 U. S. Comp. Stat. pages 2995, 2996. In the following quotation may be found an excerpt of that portion of the act which is material to this case with the additions made to this part of the original act printed in italics: No railroad company carrying cattle from one state into another, etc., "shall confine the same in cars, boats, or vessels of any description for a period longer than 28 consecutive hours without unloading the same *in a humane manner into properly equipped pens* for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental

*or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight; provided that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill-of-lading or other railroad form, the time of confinement may be extended to 36 hours, * * * it being the intent of this act to prohibit their continuous confinement beyond the period of 28 hours except upon the contingencies hereinbefore stated."*

It is a general rule of law that one may do by his agent whatever he may do himself. There are duties, services and acts to the proper performance of which personal judgment and skill are indispensable that are excepted from this rule, but a request that the time of confinement of a shipment of cattle be extended for eight hours is not of this character. The Act of Congress does not modify the general law of agency and an owner of animals may delegate to another the power to arrange and contract with a carrier for their shipment, to make the request for the extension of the time of confinement specified in the Act of Congress under consideration and to do any other act relating to the transportation which he could have done himself. The authorized agent of the owner of a particular shipment of animals may lawfully make the request of the carrier specified by the Act of June 29, 1906, that their confinement be extended to 36 hours.

It is only when a railroad company knowingly and wilfully violates this law that it becomes liable for the penalty it prescribes. There is a legal presumption that one to whom an owner entrusts the possession and control of his personal property in order that he may deliver it to a carrier for transportation has authority to stipulate with the carrier the terms of carriage and that one to whom an owner of animals has entrusted them for delivery to and shipment by a railroad company and who actually delivers and ships them is authorized by the owner to make the written request specified in the law and to do any other usual act relevant to such a transaction. *Hutchinson on Carriers*, 2nd Ed. §§84a, 265, 266, 3rd Ed. §457; *Nelson v. Hudson River R. R. Co.*, 48 N. Y. 498, 504; *Squire et al. v. New York Central R. R. Co.*, 98 Mass. 239, 248; *Zimmer v. New York C. & H. R. R. Co.*, 137 N. Y. 460, 462, 463. A railroad company is justified in relying upon this presumption and cannot be held to have violated this act knowingly and wilfully because it confines animals more than 28 and less than 36 hours in reliance upon it without any notice or knowledge that the authority is defective.

On the morning of September 21, 1907, the cattle were in the pens of the Kansas City Stock Yards Company of Missouri subject to the order of Byers Bros. & Company from whom one Bradley bought them with his promissory note and a mortgage on the cattle to Byers

Bros. & Company. He requested the Railroad Company to furnish him cars and to haul these cattle to his farm at Elmo, made a contract with the Company for their transportation and directed Byers Bros. & Company to ship them out. In the afternoon of this day Byers Bros. & Company issued its order to the Stock Yards Company to load the cattle for account of Bradley, signed the request in controversy and delivered it to the railroad Company, directed that Company to ship the cattle from Byers Bros. & Company consignors to Bradley the consignee and the Company so wrote the bills-of-lading and waybills, obtained these bills-of-lading from the Railroad Company and about 8 in the evening delivered them and the cattle to Bradley on the cars in Kansas City, Missouri. Meanwhile the cattle had been loaded at Kansas City, Kansas, and had been hauled across the state line into Kansas City, Missouri, where Bradley took the bills-of-lading from Byers Bros. & Company, boarded the train and went on with the cattle to their destination. Conceding that after Bradley gave his note and mortgage he was the owner of the cattle they still remained in the custody of Byers Bros. & Company subject to their orders only, at the time they made the request for the extension of their time of confinement upon the cars and until they delivered the bills-of-lading and the cattle to Bradley in Kansas City, Missouri, three or four hours after they had signed the request and shipped the cattle to their destination. As Byers Bros. & Company had the custody and the power to move and ship the animals when they made the request and as by the exercise of that power and control the cattle were delivered to the Railroad Company and its bills-of-lading were obtained by Byers Bros. & Company, the request was lawfully made by them under the statute because they were the persons in custody of the particular shipment when the request was made.

Was this request ineffectual because a portion of it was printed and a part of it was in manuscript? It is elementary law that an instrument printed, engraved and stamped, or partly printed, engraved or stamped and partly in hand-writing is a written instrument unless the fact clearly appears that the word "written" was used in the statute or contract under construction for the express purpose of distinguishing manuscript from printing, engraving or stamping. *Benson v. McMahon*, 127 U. S. 457, 468-470; *In re Benson*, 34 Fed. 649, 652; *Henshaw v. Foster*, 26 Mass. 312, 317, 321. Counsel argue that the word "printed" qualifies bill-of-lading and also the term "other railroad form" in the clause "which written request shall be separate and apart from any printed bill-of-lading or other railroad form," and that the word "written" is used in this proviso in contradistinction to the word "printed." But this interpretation is too

subtle and ingenious to be sound; it is not the natural and plain meaning of the section and a printed request or one partly in print and partly in manuscript is a written request within the true meaning of this act.

Was the request invalid because it was upon a railroad form? It is required by the statute to "be separate and apart from any printed bill-of-lading or other railroad form" and nothing more. If the request is on railroad form No. 148 which contains nothing but the request and is "separate and apart from any printed bill-of-lading or other railroad form" is it not within the terms of the statute? It is not on or in or connected with any printed bill-of-lading or other railroad form, it is separate and apart from each of these and it cannot be held to be without the words or the meaning of this proviso of the section. The Congress was accustomed to use concise and fit language to express its intentions. If it had intended to invalidate every request upon a railroad form the natural and apt expression of that purpose would have been "which written request shall not be upon or in any railroad form." The fact that it did not use this simple declaration but enacted that it should be "separate and apart from any printed bill-of-lading or other railroad form" comes very close to a demonstration that it did not intend to and that it did not prohibit the embodiment of a lawful request in a railroad form. The plain object of this clause of the act was to make it certain that the owner or person in custody of the shipment should know when he made the request that he was making it and should exercise his judgment and choice in the matter. Its purpose was to prevent the concealment of the request in any railroad form which treated of other subjects or contained other terms that might withdraw the attention of the signer from the request and cause him to sign it without knowledge that it was there or without a conscious exercise of his option. The end sought is as perfectly attained by a separate request upon a railroad form as by one upon any other piece of paper. The Solicitor of the Department of Agriculture, to which the administration of this law is entrusted, held in 1906, that it was not intended to prevent a railroad company from printing an appropriate request to be used exclusively for the purpose of enabling owners and persons in custody of shipments to make with more clearness and facility the request that the confinement of their animals in transit should be extended to 36 hours. No persuasive reason for a departure from that ruling has been presented and our conclusion is that a request upon a railroad form separate and apart from a bill-of-lading or other railroad form than one which contains the request alone is a compliance with the statute.

Counsel for the government insist that the request did not fall within the Act of Congress because it was made before the shipment started on its way and because it was not induced by an unforeseen emergency which arose during the transportation. The statute prescribes no such conditions or limitations to the validity of the request, but counsel support their position by quoting the words "it being the intent of this act to prohibit their continuous confinement beyond the period of 28 hours except upon the contingencies hereinbefore stated," by arguing that if the request may be made before the transportation commences the statute becomes in effect a thirty-six-hours, instead of a twenty-eight-hours law and by reviewing the debates upon the bill which became the act under consideration, wherein statements may be found that one of the objects of the provision that the time of confinement might be extended was to enable the person in custody of the animals during the transportation to secure such an extension in case of an unusual occurrence. But when all that part of the section pertinent to these questions is read together the fact is at once apparent that the "contingencies hereinbefore stated" referred to in the quotation under which the time may be extended are the prevention of the transportation within 28 hours "by storm or other accidental or unavoidable causes which cannot be avoided by the exercise of due diligence and foresight" and the written request of the owner or person in custody. In other words the law reads that the company is excused for confining the animals more than 28 hours by unforeseen, accidental or unavoidable causes of delay without the request and by the request without the unforeseen, accidental or unavoidable causes. Inasmuch as the extension was permitted without the request, for unforeseen, accidental or unavoidable causes of delay the grant of the extension upon the request only in cases of such causes would have been useless and this could not have been the intent of the Congress and cannot be the true interpretation of the act. The request without the unforeseen causes and each of these causes without the request is alike one of the "contingencies hereinbefore stated" under which the confinement may be lawfully extended beyond the 28 hours.

While there are statements in the debates upon the bill as has been stated that one of the purposes of the permission to extend the time of confinement upon a request was that the person in custody during the transportation might provide for an unanticipated emergency, there are also clear statements in those debates that another of the purposes of the permission was to enable those owners whose cattle were shipped from points more than 28 and less than 36 hours' run from their destination, or from pens suitably equipped for unloading, watering, feeding and resting them, to avoid unloading them on the

way. It is much more cruel and injurious to cattle and sheep to unload and reload them than it is to continue their confinement 8 hours when the 28-hours limit is reached. This fact was repeatedly called to the attention of the members of Congress during their consideration of the bill and there can be no reasonable doubt that they intended to make the permission granted broad enough to attain this end. Owners of this class, however, know the distance of their animals from their destination and from suitably equipped pens and the time ordinarily required to take them to these places and may as advisedly make or decline to make the request before as after the animals start on their journey. And a careful review of the portions of the debates upon the bill pointed out and of the act itself has disclosed nothing in the law, in its spirit or purpose, or in the intention of Congress there expressed, which limits the time within which a valid request may be made thereunder to that subsequent to the commencement of the transportation of the animals.

The terms of the proviso which is the subject of this discussion are "Provided that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any bill-of-lading or other railroad form, the time may be extended to 36 hours." The maintenance of the contentions of counsel for the government would so amend this act that in legal effect it would read: Provided that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any bill-of-lading or other railroad form, the time of confinement may be extended to 36 hours, except when the request is made by the authorized agent of the owner or person in custody, except when the request is not entirely in hand-writing, except when the request is in or on a separate railroad form, except when the request is made before the transportation of the shipment has commenced and except when the request is not induced by an unforeseen casual emergency which arose after the shipment was started on its way. But the power was conferred and the duty was imposed upon the members of Congress and not upon the courts to determine whether or not these exceptions to the express terms of the proviso should be made. They did not make them and that fact raises a conclusive presumption that they did not intend to make them and it is not the province of the courts to do so. *Madden v. Lancaster County*, 12 C. C. A. 566, 572, 65 Fed. 188, 194; *Wrightman v. Boone County*, 31 C. C. A. 570, 572, 88 Fed. 435, 437; *Omaha Water Company v. City of Omaha*, 77 C. C. A. 267, 279, 147 Fed. 1, 13; *Armour Packing Co. v. United States*, 82 C. C. A. 135, 153, 153, Fed. 1, 19.

The bill, the debates upon it, and the act, fail to convince that the members of Congress ever had any intention to make any of these exceptions. If, however, such an intention ever existed it was a secret intention that is not expressed in the statute. And it is the intention expressed in the statute and that alone to which the courts may lawfully give effect. They may not assume or presume purposes and intentions that the terms of the law do not indicate and then enact and expunge provisions to carry out those supposed intentions. The act must be held to mean what it clearly expresses.

United States v. Ninety-nine Diamonds, 72 C. C. A. 9, 12, 139 Fed. 961, 964; *Brun v. Mann*, 80 C. C. A. 513, 525, 151 Fed. 145, 157.

The written request should have been received in evidence and the motion of the Railroad Company for a judgment in its favor should have been granted. The judgment below must accordingly be reversed and the case must be remanded to the Circuit Court with directions to grant a new trial.

It is so ordered.

Filed April 9, 1910.

[Cir. 35]

○



Issued June 27, 1910.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 36.

GEO. P. McCABE, Solicitor.

THE TWENTY-EGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Eighth Circuit affirming the decision of the District Court for the District of Kansas in cases involving violations of the Twenty-eight Hour Law (Act of June 29, 1906; 34 Stat. 607).

SYLLABUS.^a

1. A legal request for the confinement of live stock, under section 1 of the Twenty-eight Hour Law, may be made (1) by the authorized agent of the owner of the particular shipment; (2) such a request may be printed, engraved, or stamped, and partly in handwriting; (3) a legal request may be made on or in a railroad form separate and apart from a printed bill of lading or other railroad form than one which contains the request alone; (4) such a request may be made before the transportation of the shipment commences; (5) such a request may be made although it is not induced by any emergency or contingency that arises after the transportation commences and that was unforeseen at that time.

2. A suit under the Twenty-eight Hour Law is a civil action and a preponderance of the evidence in favor of the Government is sufficient to warrant a verdict against the defendant.

3. Under the Twenty-eight Hour Law, it is the duty of the court to affix the penalty.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 3076.—December Term, A. D. 1909.

THE ATCHISON, TOPEKA AND SANTA FE Railway Company, <i>Plaintiff in Error</i> , vs. THE UNITED STATES OF AMERICA, <i>Defendant in Error</i> .	}	In Error to the District Court of the United States for the Dis- trict of Kansas.
--	---	--

Mr. Robert Dunlap (Mr. William R. Smith and Mr. Gardiner Lathrop, were with him on the brief) for Plaintiff in Error.

Mr. H. J. Bone and Mr. J. S. West, submitted brief for Defendant in Error.

^a Not by the court.

Before SANBORN and ADAMS, *Circuit Judges*, and AMIDON, *District Judge*.

SANBORN, *Circuit Judge*, delivered the opinion of the court.

The Act of June 29, 1906, to prevent cruelty to animals while in transit, 34 Stat. Chap. 3594, Page 607, U. S. Comp. Stat. 1901, Supp. 1907, Page 918, provides that no railroad company carrying animals from one state into another, etc., "shall confine the same in cars, boats or vessels of any description for a period longer than 28 consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water and feeding, for a period of at least 5 consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight; provided that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill-of-lading or other railroad form, the time of confinement may be extended to 36 hours, * * * it being the intent of this act to prohibit their continuous confinement beyond the period of 28 hours except upon the contingencies hereinbefore stated" and prescribes a penalty of from \$100.00 to \$500.00 for each violation of the law.

The writ of error in this case challenges a judgment against the Atchison, Topeka & Santa Fe Railway Company for five violations of this act. In the trial of a count which charges one of these violations the defendant offered evidence that the cattle were not confined more than 36 hours and a written request on a railroad form partly in manuscript and partly in print which was separate and apart from any bill-of-lading or other railroad form for an extension of the time of confinement of the shipment from 28 to 36 hours under this law. The court below rejected this request and this ruling is specified as error. Counsel for the government endeavored to support the ruling of the court upon the grounds that (1) the owner of the cattle was one Perry, the person in custody of the shipment was one Pettis, the person who signed the request was one Crawford and the evidence that the latter was the agent of the owner was insufficient to go to the jury. (2) An agent of the owner may not lawfully make such a request. (3) The request was not a written one because it was partly in print and partly in manuscript. (4) It was on a railroad form. (5) It was made before the shipment started on its way. (6) It was not induced by any contingency which arose after the shipment and was unforeseen when the shipment was made. But in *Wabash Railroad Company v. United States*, — Fed. —, — C. C. A. —, which was argued at this term, all these contentions except the first have been

considered in the light of the arguments and briefs of counsel in both these cases and upon the opinion in that case to which reference is made for the reasons for our conclusions we hold that (1) a legal request under this act may be made by the authorized agent of the owner of the particular shipment, (2) such a request may be printed, engraved, or stamped, or partly printed, engraved, or stamped, and partly in hand-writing, (3) a legal request may be made on or in a railroad form separate and apart from a printed bill-of-lading or other railroad form than one which contains the request alone, (4) such a request may be made before the transportation of the shipment commences, (5) such a request may be made although it is not induced by any emergency or contingency that arises after the transportation commences and that was unforeseen at that time.

But the majority of the court are of the opinion that the evidence of the authority of Crawford to make the request as the agent of the owner or of the person in custody of the cattle was not sufficient to go to the jury and for that reason there was no error in the rejection of the request.

It is assigned as error that on the trial of the charges in all the counts the court instructed the jury that this was a civil action and that a preponderance of the evidence in favor of the government was sufficient to warrant a verdict against the defendant when it should have instructed them that while the action was civil in form it was criminal in its nature and effect and the higher degree of proof was requisite to sustain the case of the United States. The majority of the court are of the opinion that there was no error in this charge upon the authority of and for the reasons stated in the opinions in *Chicago, Burlington & Quincy Ry. Co. v. United States* —, C. C. A. —, 170 Fed. 556, 558, 559; *Hepner v. United States*, 213 U. S. 103 and *United States v. Southern Pacific Company*, 162 Fed. 412, and the cases there cited, while the writer is of the opposite view upon the authority of and for the reasons stated in the opinions in *United States v. Shapleigh*, 4 C. C. A. 237, 241-245, 54 Fed. 126, 129-134; *United States v. Illinois Central R. R. Co.*, 156 Fed. 182 and *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, — C. C. A. —, 172 Fed. 194, 196, 197, and the cases there cited. This objection to the course of the trial is accordingly overruled.

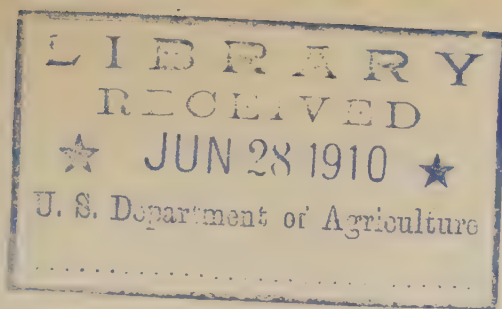
Another specification of error is that the court fixed the amount of the recoveries when the jury should have done so. But we are of the opinion that there was no error in this method of procedure, the majority of the court because the amounts of the recoveries could not be measured by any damages the government sustained and hence were not determinable by the jury by the consideration of any evidence of this character but were measureable by the heinousness of

the offenses and it is the special function of a court rather than that of a jury to make such a measurement in the exercise of its sound judicial discretion, *Chelsey v. Brown*, 11 Me. 143, 148; *United States v. Boston & A. R. Co.*, 15 Fed. 209, 212; *United States v. Southern Pacific Company*, 157 Fed. 459, 464; *United States v. Atlantic Coast Line R. Co.*, — C. C. A. —, 173 Fed. 764, 771, and the writer because in his opinion while this proceeding was civil in its form it was criminal in its nature and effect and it was the province and duty of the court to fix the penalties. The judgment below must accordingly be affirmed and It is so Ordered.

Filed April 9, 1910.

(Cir. 36)





Issued June 27, 1910.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 37.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Eighth Circuit, reversing the decision of the District Court for the District of Kansas in cases involving violations of the Twenty-eight Hour Law. (Act of June 29, 1906; 34 Stat., 607.)

SYLLABUS.^a

1. Under the Twenty-eight Hour Law, whether an extension request complies with the statute is a question of law for the court; it is error to submit such question to the jury.

2. A legal request for the confinement of live stock, under section 1 of the Twenty-eight Hour Law, may be made (1) by the authorized agent of the owner of the particular shipment; (2) such a request may be printed, engraved, or stamped and partly in handwriting; (3) a legal request may be made on or in a railroad form separate and apart from a printed bill of lading or other railroad form than one which contains the request alone; (4) such a request may be made before the transportation of the shipment commences; (5) such a request may be made although it is not induced by any emergency or contingency that arises after the transportation commences and that was unforeseen at that time.

3. A preponderance of the evidence is sufficient to sustain an action under the Twenty-eight Hour Law, and the Government is not required to prove its case beyond a reasonable doubt.

4. It is the duty of the court, in actions under the Twenty-eight Hour Law, to fix the amount of the recovery.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 3090.—December Term, A. D. 1909.

THE MISSOURI, KANSAS & TEXAS RAILWAY Company, <i>Plaintiff in Error</i> , vs. THE UNITED STATES OF AMERICA, <i>Defendant</i> <i>in Error</i> .	}	In Error to the District Court of the United States for the Dis- trict of Kansas.
--	---	--

Mr. W. W. Brown (Mr. John Madden, Mr. J. G. Slonecker and Mr. James Hagerman were with him on the brief), for Plaintiff in Error.

^a Not by the court.

Mr. H. J. Bone and Mr. J. S. West submitted brief for Defendant in Error.

Before SANBORN and ADAMS, *Circuit Judges*, and McPHERSON, *District Judge*.

SANBORN, *Circuit Judge*, delivered the opinion of the court.

The Missouri, Kansas & Texas Railway Company complains of alleged errors in the trials of four charges against it for as many violations of the Act of June 29, 1906, Chap. 3594, 34 Stat. 607, U. S. Comp. Stat. Supp. 1907, Page 918, which prohibits the confinement of certain animals in cars in transit for more than 28 hours, except in certain specified contingencies, under a penalty of a fine from \$100.00 to \$500.00, for knowingly and wilfully violating this inhibition. The act provides that an extension of the time of confinement from 28 to 36 hours may be permitted "upon the written request of the owner or person in custody of that particular shipment, which request shall be separate and apart from any bill-of-lading or other railroad form," and in defense of three of the charges the defendant introduced evidence which tended to show that the cattle shipped were not confined more than 36 hours and a separate request by the owner of each of these shipments that the time of their confinement be extended to 36 hours. Counsel for the United States contended below and still insist that these requests fail to comply with the Act of Congress (1) because they were partly printed and partly in hand-writing, (2) because they were made on railroad forms, notwithstanding the fact that these forms contained nothing but the requests, (3) because some of the requests were made before the transportation to which they relate commenced and (4) because some of them were not induced by any contingencies that arose after the cattle started on their way and that were not anticipated before they started. The defendant assigns as error the ruling of the court whereby it submitted to the jury the question whether or not in view of these objections the requests conformed to the Act of Congress and were legal. The objections to the requests were not sound and the requests complied with the statute for the reasons which are stated at length in the opinion of this court in *Wabash Railroad Company v. United States*, — Fed. —, — C. C. A. —, a case that was argued at this term and was decided after a deliberate consideration of the briefs and arguments in that case, in this case and in the case of the *Atchison, Topeka & Santa Fe Railway Company v. United States*, — Fed. —, — C. C. A. —, which involved similar questions. The question whether or not the requests conformed to the statute was a pure question of law, it presented no dispute about any fact, its decision depended entirely upon the construction of the Act of Congress and of the

written requests. It is the exclusive province as well as the duty of the court to construe statutes and written instruments and, where the validity of the latter is conditioned by a compliance with the provisions of the former, to decide their legality and to instruct the jury accordingly. Any other course would destroy all security for property and lead to intolerable confusion and uncertainty. For while a decision of a court upon such a question presents a precedent generally conclusive in subsequent cases both in that court and in others the verdict of a jury upon it would form neither a binding nor a persuasive precedent for another jury in a subsequent case, and the meaning of the statutes and the legality of written instruments if left to the determination of a jury would vary with the chance views of men whose minds have never been trained to consider and determine such issues. The court fell into an error when it submitted to the jury the legality of the written requests in the face of the objections presented. *Denison's Executors v. Wertz*, 7 Serg. & R. Rep. (Pa.) 372, 375; *Cook's Lessee v. Carroll*, 6 Md. 104, 111; *Levy v. Gadsby*, 3 Cranch 180, 185; *Higgins v. McCrea*, 116 U. S. 671, 682.

The defendant complains that on the trial of each of the counts under consideration the court instructed the jury that this was a civil action and that a preponderance of evidence in favor of the government was sufficient to warrant a verdict against the defendant when it should have instructed them that while the suit was civil in form it was criminal in its nature and effect and they could find no verdict in favor of the government unless it established its case by proof beyond a reasonable doubt. The majority of the court are of the opinion that there was no error in this charge on the authority of and for the reasons stated in the opinions in *Chicago, Burlington & Quincy Ry. Co. v. United States*, 95 C. C. A. 642, 170 Fed. 556, 558, 559; *Hepner v. United States*, 213 U. S. 103, and *United States v. Southern Pacific Company*, 162 Fed. 412, and the cases there cited, while the writer is of the opposite view on the authority of and for the reasons stated in the opinions in *United States v. Shapleigh*, 4 C. C. A. 237, 241-45, 54 Fed. 126, 129-134; *United States v. Illinois Central R. R. Co.*, 156 Fed. 182, and *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 96 C. C. A. 646, 172 Fed. 194, 196, 197, and the cases there cited. This objection to the trial is accordingly overruled.

Another specification of error is that the court fixed the amounts of the recoveries when the jury should have done so. But we are all of the opinion that there was no error here, the majority of the court because the amounts of the recoveries could not be measured by any damages the government sustained and hence were not determinable by the jury by the consideration of any evidence, but were measurable by the heinousness of the offense, and it is the special function of

a court rather than that of a jury to make such a measurement in the exercise of its sound judicial discretion. *Chesley v. Brown*, 11 Me. 143, 148; *United States v. Boston & A. R. Co.*, 15 Fed. 209, 212; *United States v. Southern Pacific Company*, 157 Fed. 459, 464; *United States v. Atlantic Coast Line R. Co.*, 173 Fed. 764, 771, — C. C. A. —, and the writer because in his opinion while this proceeding is civil in its form it is criminal in its nature and effect and it was the province and the duty of the court to fix the penalties prescribed for the violation of the law.

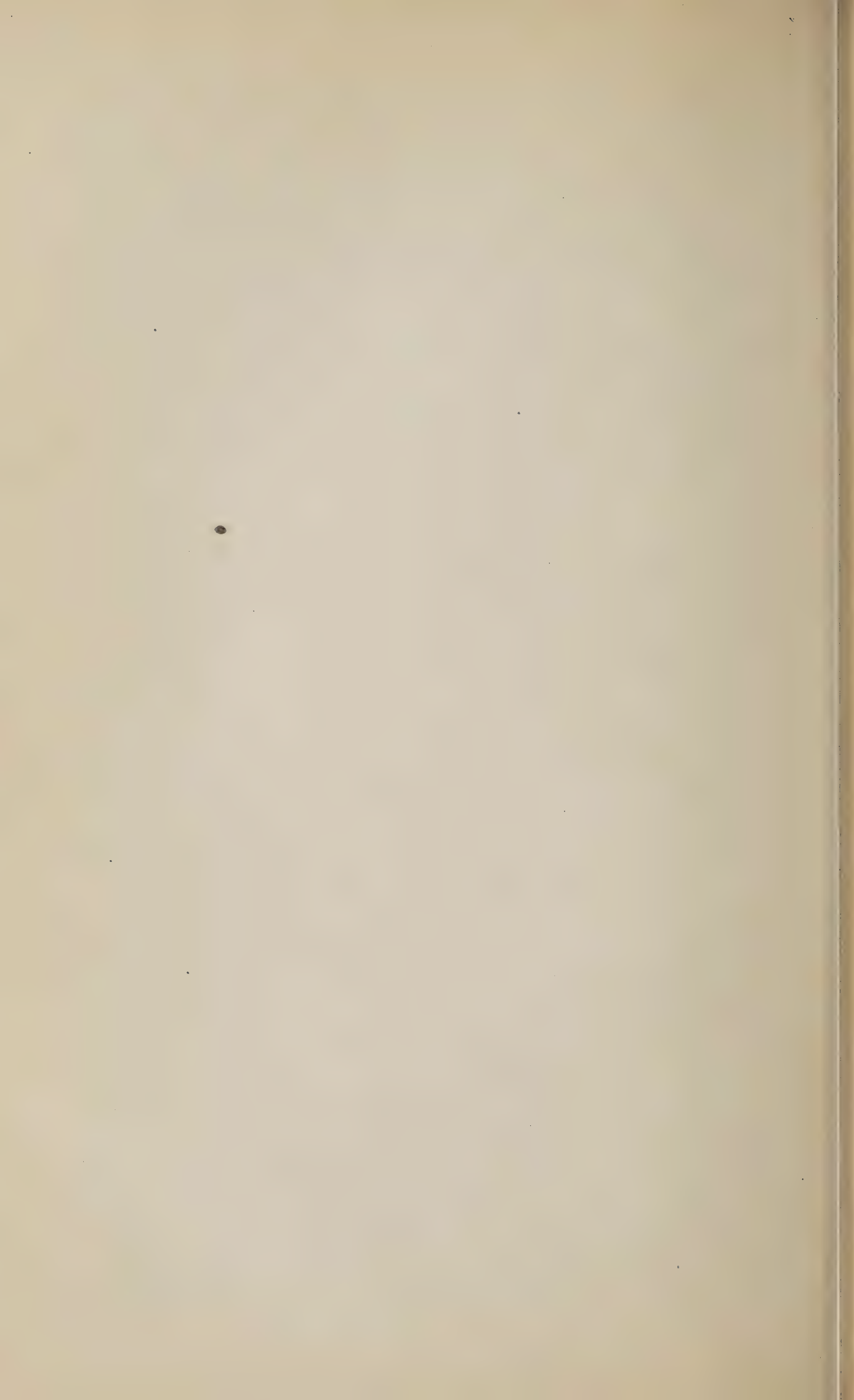
There was one charge contained in the second count of case No. 997, presented for review here against which no written request was pleaded or offered. But regarding the trial of this count complaint is made that the court refused to instruct the jury to return a verdict for the defendant upon the following facts which were established at the trial without contradiction. The defendant was an initial carrier. The cars in the shipment described in this count were delivered by it to the St. Louis & San Francisco R. R. Co., its connecting carrier, on their way to their destinations near Rosedale, Missouri, within 18 hours after they were loaded and delivered to the defendant. They were delivered to the Frisco Company to be hauled by it to the Kansas City stock yards where they were to be unloaded. The distance from the points where the defendant delivered the cars to the Frisco Company to the place of unloading was $1\frac{1}{2}$ miles and the time usually occupied by the latter Company in taking a train-load of cattle from the place where the defendant delivered these cattle to it to the stock yards and returning the cars to the place of delivery was two hours. There was no evidence that the defendant knew or had any notice that a time so long as to extend the confinement beyond the 28 hours would be required or taken by the Frisco Company to draw these cattle to the pens at the stock yards and to unload them. But it was more than 13 hours after the defendant delivered the cattle to the Frisco Company before it hauled them to the pens and unloaded them. At the time the defendant delivered this shipment to the Frisco Company it had no railroad to the Kansas City stock yards. The Frisco Company had switch engines to take the cattle to those yards and it was engaged in handling loaded cars from the place of delivery of these cattle to it at Rosedale to the unloading pens in the stock yards for the defendant at its regular published tariff rates. It is only when a railroad company knowingly and wilfully confines animals more than 28 hours that it is guilty of any violation of the act under consideration and it cannot be held to have committed such a violation when it has delivered cattle to its succeeding carrier in time according to the ordinary course of transportation for their carriage within the 28 hours to suitably equipped pens on their way or at their

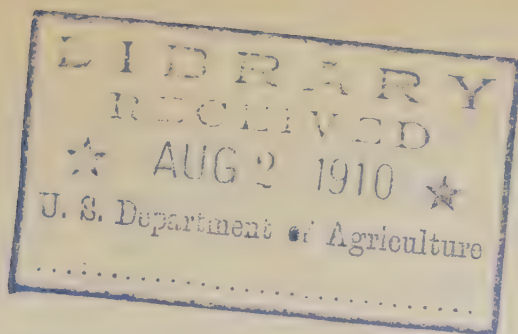
destination for unloading, feeding and watering them without any knowledge or notice that they could not be or would not be taken to the pens and unloaded within the time prescribed. There was no substantial evidence in this case in support of the charge of the unlawful detention by the defendant of the cattle of E. C. Snyder described in the second count in the petition in case No. 997, and the court should have directed a verdict for the defendant thereon. The conclusion is that there was prejudicial error in the trial of each of the four charges, the judgment upon each of them must accordingly be reversed and a new trial of each must be directed, *and it is so Ordered.*

Filed April 9, 1910.

(Cir. 37)

O





Issued July 28, 1910.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 38.

GEO. P. McCABE, Solicitor.

MEAT-INSPECTION LAW.

MEAT FOOD PRODUCT—LARD SUBSTITUTE.

REGULATIONS OF THE SECRETARY OF AGRICULTURE.

Opinion by J. A. Fowler, Acting Attorney-General, United States Department of Justice, upon the question whether lard substitute and the establishments where the same is manufactured are subject to inspection under the Meat-Inspection Law (34 Stat., 674).

SYLLABUS.^a

1. The inspection authorized under the meat-inspection law does not apply alone to establishments in which both the slaughtering of the animal and the preparation of the meat food products are carried on, but to all establishments in which *any* of the processes required, from the slaughtering to the finishing of the meat food product, is conducted.

2. The term "similar establishments" as used in the meat-inspection law was intended to include all establishments, which are not specifically mentioned, in which the animal is slaughtered, or the carcass or meat is prepared, or in which the meat food product is manufactured.

3. Whether or not lard substitute and the establishments where the same is manufactured are subject to inspection under the meat-inspection law depends upon the determination whether lard substitute is a "meat food product."

4. The language of the meat-inspection law indicates that the term "meat food product" does not merely embrace a food which consists wholly of the meat of an animal.

5. The determination of the meaning of the term "meat food product" is essential to the proper enforcement of the meat-inspection law, and as Congress has not defined the term, and it has no well-defined meaning, but is one of commercial usage, such determination is not a question of law upon which the Attorney-General may express an opinion, but is a question of fact.

6. Congress having vested in the Secretary of Agriculture the power to make such rules and regulations as may be necessary for the efficient execution of the provisions of the meat-inspection law, the power to determine what manu-

^a Syllabus by the Acting Attorney-General.

factures are "meat food products" rests in the Secretary of Agriculture, subject to the restriction that the definition of the term adopted be not clearly and unquestionably outside the intent of the act.

7. The definition of a "meat food product" as given by the Secretary of Agriculture in Regulation 3, section 8, is valid.

DEPARTMENT OF JUSTICE,
Washington, July 22, 1910.

The honorable the SECRETARY OF AGRICULTURE.

SIR: I have the honor to acknowledge receipt of your communication of the 15th instant, in which you ask my opinion upon certain questions arising under the meat-inspection provisions of the act of June 30, 1906 (34 Stat., 674).

The facts upon which these questions arise are as follows:

There are certain companies who are manufacturers of a lard substitute, which is composed of cotton-seed oil and oleo stearin. Oleo stearin is the commercial name for beef fat, carefully rendered and pressed to extract the oil, which is known as oleo oil, and is the solid residuum after extracting this oil, and of itself is never used for food of any kind. The oleo oil is extracted under heavy hydraulic pressure, leaving the oleo stearin an extremely hard, compact mass, and this is the condition in which it reaches the manufacturing establishments in question. This substance is again melted at a high and sterilizing temperature, and after being blended with cotton-seed oil is subjected to a refrigerating process. The compound thus made consists of 80 per cent cotton-seed oil and 20 per cent oleo stearin, and enters into commerce and is sold and used as a lard substitute.

The questions which you propound are:

First. Is this lard substitute subject to inspection and marking under said meat-inspection act?

Second. Is the Secretary of Agriculture empowered to determine and fix, by regulation, whether this lard substitute is a meat food product?

The manufacturers insist that under the terms of the meat-inspection statute neither the plant wherein this product is manufactured nor the product itself is subject to inspection; and it is true that if the statute, taken as a whole, must be so construed as not to include these plants and the products thereof, then any regulation made by the Secretary of Agriculture which does include them would be unauthorized and void, notwithstanding the last clause of the nineteenth paragraph of the act, which provides:

And said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this act.

This provision does not, of course, undertake to authorize the Secretary of Agriculture to exercise any powers which are not, by express language or by implication, vested in him by the terms of the statute.

To properly understand the scope of the act as bearing upon the questions presented, it is necessary to consider a number of its provisions together, as some ambiguity exists in the language of one or more of the paragraphs when considered alone. The purpose of the statute, as stated in the first clause of the meat-inspection provisions, has a very important bearing. The object is there declared to be the prevention of—

the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food;

and this object should be kept steadily in mind in determining to what plants and what food products the act was intended to apply.

In the first paragraph it is provided that—

The Secretary of Agriculture, at his discretion, may cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered, and the meat and meat food products thereof are to be used in interstate or foreign commerce.

Clearly, the last clause is out of position, and it should, with a slightly different wording, be inserted after the word "goats," making it read:

The Secretary of Agriculture * * * may cause to be made * * * an examination and inspection of all cattle, sheep, swine, and goats, *the meat and meat food products of which are to be used in interstate or foreign commerce*, before they shall be allowed to enter, etc.

The second paragraph provides that the Secretary of Agriculture—

shall cause to be made by inspectors appointed for that purpose, as hereinafter provided, a post-mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce;

and the third paragraph was inserted for the purpose of making clearer the scope of the second paragraph, and reads as follows:

The foregoing provisions shall apply to all carcasses or parts of carcasses of cattle, sheep, swine, and goats, or the meat or meat products thereof which may be brought into any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and

such examination and inspection shall be had before the said carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be treated and prepared for meat food products; and the foregoing provisions shall also apply to all such products which, after having been issued from any slaughtering, meat-canning, salting, packing, rendering, or similar establishment shall be returned to the same or to any similar establishment where such inspection is maintained.

The fourth paragraph provides that the Secretary of Agriculture shall cause to be made—

an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment,

and declares that the inspectors shall have access at all times, both day and night, to such establishments, whether in operation or not.

The fifth paragraph provides that all cans, pots, tins, canvas, or other receptacles or coverings in which the inspected meat or meat-food products are placed shall be labeled "Inspected and passed," and declares that no inspection of meat and meat food products deposited or inclosed in such receptacles—

shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector.

The sixth paragraph provides that the Secretary of Agriculture—shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat-canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate and foreign commerce, as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishment shall be maintained;

and that where such premises shall not be kept in proper sanitary condition, he shall refuse to allow the meat or meat food products to be labeled.

The nineteenth paragraph provides:

That the Secretary of Agriculture shall appoint from time to time inspectors to make examination and inspection of all cattle, sheep, swine, and goats, the inspection of which is hereby provided for, and of all carcasses and parts thereof and of all meat and meat food products thereof, and of the sanitary conditions of all establishments in which such meat and meat food products hereinbefore described are prepared;

and further specifies the duties of the inspectors with reference to labeling the carcasses and the meat food products derived therefrom.

The twenty-first paragraph provides:

That the provisions of this act requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered

by any farmer on the farm and sold and transported as interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products supplying their customers;

but declares it a criminal offense to knowingly sell or offer for sale or transportation in interstate or foreign commerce any meat or meat food products which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food; and authorizes the Secretary of Agriculture to maintain the inspection provided for in the act at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, notwithstanding the persons operating the same be retail butchers or dealers or farmers; and provides that where the Secretary of Agriculture shall establish such inspection the provisions of the act shall apply.

It will thus be seen that the provisions follow each other in a logical sequence. The first relates to the animal before it enters the slaughtering establishment; the second to the carcass, after the animal has been slaughtered; the third defines the scope of the second paragraph by declaring explicitly to what carcasses and products thereof it shall apply. The fourth applies to all meat food products after they have been prepared from the carcasses; the fifth declares that such products shall be subject to inspection until after they are sealed and inclosed in the receptacle; the sixth provides for the inspection of the premises upon which the slaughtering, etc., is done, and the carcasses handled and prepared, or the meat food products manufactured; and the nineteenth makes clearer the meaning of the preceding paragraphs by prescribing the duties of the inspectors, and particularly pointing out what animals and carcasses thereof and products therefrom, and what premises shall be subject to their inspection.

The manufacturers of this lard substitute insist that their establishments are not subject to inspection, because the oleo stearin used by them is manufactured and inspected elsewhere, and they have nothing to do with the slaughtering of the animal or the cleaning and preparation of its carcass.

Section 6, if read alone, gives some countenance to the theory that only an establishment in which both the slaughtering of the animal and the meat and meat food products therefrom are prepared is subject to inspection. The language there used is that the Secretary—shall cause to be made * * * inspection of all slaughtering, meat-canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered *and* the meat and meat food products thereof are prepared for interstate and foreign commerce.

But, when considered with the remainder of the act, it is apparent that no such narrow construction was intended to be given to this

language, and that it is equivalent to saying that the Secretary shall have inspected—

all slaughtering, meat-canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and (*establishments in which*) the meat and meat food products thereof are prepared.

No other meaning is consistent with the third paragraph, which expressly provides that the inspection shall apply to all carcasses, meat or meat products, which, *after having been issued from any of the establishments mentioned*, “shall be returned to the same or to any similar establishment where such inspection is maintained,” thus showing that the inspection was not intended to be confined to buildings in which both the slaughtering of the animal and the preparation of the meat food products were carried on.

A like intent is shown by the provisions of paragraph 19, which declares it to be the duty of the inspectors to make examination of all the animals of the kinds mentioned, and of all carcasses and parts thereof, and of all meats and meat food products thereof, “*and of the sanitary conditions of all establishments in which such meat and meat food products hereinbefore described are prepared.*”

Clearly, therefore, it was intended by the act that all animals which are to be slaughtered in an establishment of the kinds mentioned, and all carcasses and products of the carcasses thereof, and all meat food products manufactured from such carcasses, and all establishments in which *any* of the processes required, from the slaughtering to the finishing of the meat or meat food product, is carried on, should be subject to inspection.

It is next insisted by these manufacturers that their establishments do not fall within either of the terms “slaughtering, meat-canning, salting, packing, rendering, or similar establishments;” and it must be conceded that if included at all it is under the general term “similar establishments.”

They attempt to apply, in construing this oft-repeated phrase, the principle of *ejusdem generis*, and insist, in effect, that the general expression has no meaning whatever and can include no establishment which can not be considered as belonging to one of the classes particularly named.

The last case in which consideration to this question was given by the Supreme Court is that of *United States v. Mescall* (215 U. S., 26, 31), in which it was insisted by the defendant that a statute which provides a penalty against “any owner, importer, consignee, agent, or other person” who shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, etc., should be restricted in its application to the persons who were concerned in the importation, and that the words “other person” did

not embrace a government weigher in the customs service. The Supreme Court, however, held to the contrary, and in its opinion quoted with approval the following from *National Bank of Commerce v. Ripley* (161 Missouri, 126, 132) :

But this (the principle of *ejusdem generis*) is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument * * *. Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the *genus* there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose.

However, the expression here used, "similar establishments," is more narrow than the words "other person," used in the statute considered in the *Mescall* case; and the character of every establishment subject to inspection must be *similar* to those which are mentioned in express terms; but the holding of the court in that case that a general phrase following special designations must be given some meaning, is here in point. Moreover, it is clear from the repeated use of this expression that Congress did not intend that it should be taken as entirely meaningless, and when considered in connection with the purposes and requirements of the act, and the duties imposed upon the inspectors, it can not be doubted, that it was intended to include all establishments which are not specifically mentioned, in which the animal is slaughtered or the carcass or meat is prepared, or in which the meat food product is manufactured.

Consequently, whether or not this act applies to the lard substitute in question and to the establishments of these manufacturers depends, after all, upon the meaning of the words "meat food product." If this term is applicable to this lard substitute, then such lard substitute, and also the establishments in which it is manufactured, are subject to inspection under the provisions of the act.

If this term has such a well-defined meaning that a court will take judicial knowledge thereof, or if it is so clearly defined in the act as to render its meaning not doubtful, then whether or not the lard substitute is subject to inspection is a question of law; but if the meaning thereof must be determined by commercial usage, then it presents a question of fact, which will not be passed upon by this department.

An examination of authorities fails to disclose any case wherein an attempt has been made to define what a "meat food product" is, or, in fact, the meaning of the word "product" when used in a similar connection; and while the provisions of the act indicate that it is not to be construed in a restricted sense, yet it is not there defined with any degree of accuracy.

That there is a distinction between the terms "meat product" and "meat food product" is clearly shown in the third paragraph of the act, wherein it is provided that the preceding provisions shall apply to—

all carcasses or parts of carcasses of cattle, sheep, swine, and goats, or the meat or *meat products* thereof which may be brought into any slaughtering * * * establishment, etc.,

and further that the before the carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be—treated and prepared for *meat food products*,

an examination and inspection shall be had; thus showing that "meat food products" are manufactures of meat or "meat products."

I think it is not warranted as a matter of law to hold that the term "meat food product" is intended to embrace nothing but a food which consists wholly of the meat of the animal. The language just referred to indicates to the contrary, and such an interpretation would greatly restrict the beneficial effects of the act.

Since, therefore, Congress has not seen proper to define the meaning of this expression, and since its definition is essential to a proper enforcement of the act, and Congress has expressly vested in the Secretary of Agriculture the power to make such rules and regulations as may be necessary for the efficient execution of the provisions of the act, the power to determine what manufactures are "meat-food products" rests in the Secretary of Agriculture, such power being restricted, of course, to the adoption of a reasonable definition of the term, and not a definition that would be clearly and unquestionably outside the intent of the act.

This power of the Secretary is upheld by numerous authorities, one of the later cases being *Bates & Guild Co. v. Payne* (194 U. S., 106, 109), where the question was whether the Postmaster-General had the power to decide whether a musical publication was a monthly magazine or whether each issue was complete within itself; and the court, after a review of the authorities, summarized the rule as follows:

That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong

presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

The application of this rule in a case presenting a similar question to the one here under consideration, was made by the Circuit Court of Appeals of the Sixth Circuit in *Coopersville Cooperative Creamery Co. v. Lemon* (163 Fed., 145, 147), Mr. Justice Lurton (then circuit judge) delivering the opinion of the court. It was there held that the Secretary of the Treasury had a right to determine that butter containing 16 per cent of moisture was adulterated butter under the terms of the act there construed, the court saying:

That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded. But that Congress may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear. (Citing numerous authorities.)

The authority to make all needful regulations, not inconsistent with the law, is not a delegation of power to add something to an incomplete law nor a grant of judicial power; it is only an authority to determine the fact upon which the operation of the law is made to depend.

In view of these authorities, I am constrained to hold that the definition of a meat food product, as given by the Secretary of Agriculture in Regulation 3, section 8, to wit:

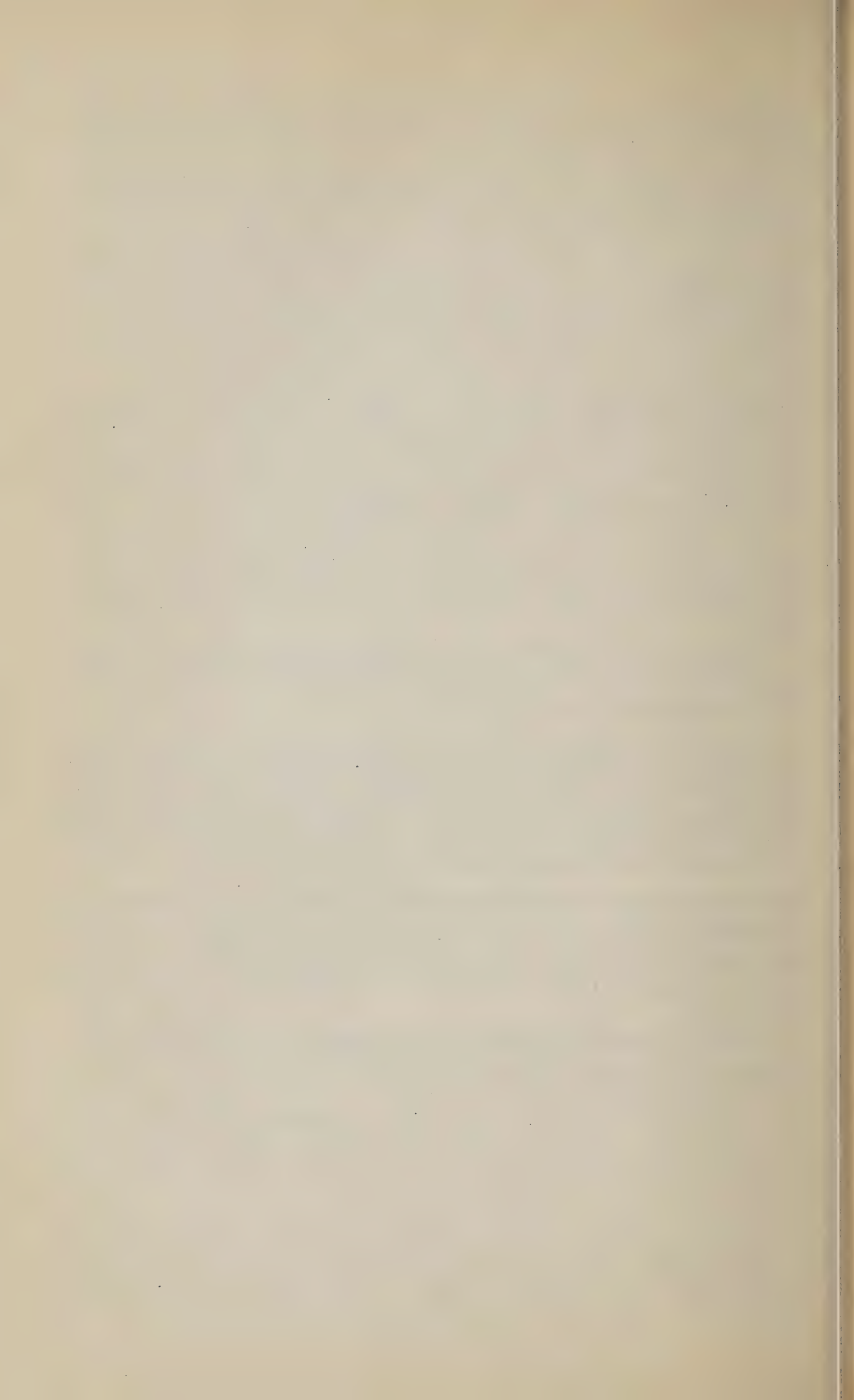
A meat food product, within the meaning of the meat-inspection act and of these regulations, is considered to be any article of food intended for human use which is derived or prepared in whole or in part from any edible portion of the carcass of cattle, sheep, swine, or goats, if the said edible portion so used is a considerable and definite portion of the finished food;

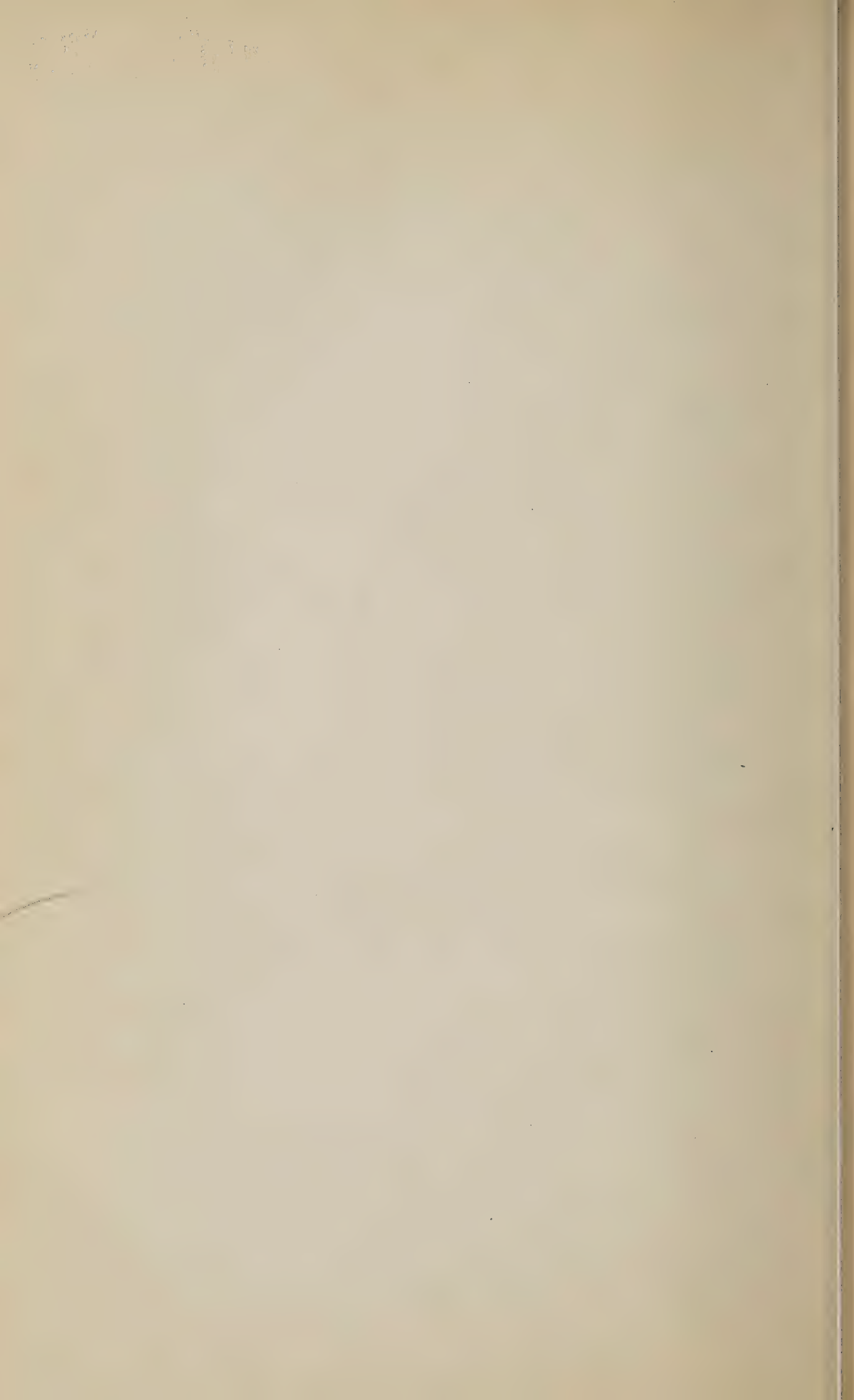
is a valid one, and that it is a question of fact for the Secretary to determine whether or not the lard substitute in question is a meat food product within the meaning of this regulation, and whether it and the establishments in which it is manufactured are subject to inspection.

I will not, therefore, undertake to pass upon the first question propounded by you, and answer the second in the affirmative.

Respectfully,

J. A. FOWLER,
Acting Attorney-General.





United States Department of Agriculture,

OFFICE OF THE SOLICITOR—CIRCULAR No. 39.

GEO. P. McCABE, Solicitor.

THE LACEY ACT.

Opinion of the Circuit Court of Appeals for the Eighth Circuit, in a case involving a violation of the Act of May 25, 1900 (31 Stat., 187), commonly known as the Lacey Act. (Filed March 5, 1910.)

SYLLABUS.^a

1. The Territory of Oklahoma had the authority to provide by legislation, as it did, that wild game, such as quail, should not be shipped out of the State, even though the game was killed during the open season.

2. The Act of May 25, 1900, is valid, wherein it is declared that the shipment out of the Territory in violation of the territorial law constitutes a crime under the national law.

3. To aid in the detection of such crimes, Congress had the authority to provide that all such interstate shipments should be plainly marked so that a person by a casual inspection would know the contents of the package.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 3052.—December Term, A. D. 1909.

PARIS N. RUPERT, PLAINTIFF IN ERROR,	} In Error to the District Court of the United States for the Western District of Oklahoma.
vs.	
THE UNITED STATES OF AMERICA, DEFEND- ant in error.	}

Mr. William O. Woolman and Mr. C. R. Buckner on the brief for plaintiff in error.

Mr. John Embry, United States attorney, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and McPHERSON, District Judge.

February 27, 1907, the grand jury of Blaine County, Oklahoma Territory, returned four indictments against defendant Rupert. In one case (No. 43) the charging part of the indictment is:

“That, on to-wit, the thirtieth day of November, in the year of our Lord one thousand nine hundred and five, in said County, and within the jurisdiction of said court, Paris N. Rupert, then and there being, did then and there, unlawfully, wilfully and feloniously deliver to the Frisco Railroad Company, a common carrier, for transportation out of said Territory and to the City of Chicago in the State of Illinois,

^a Not by the Court.

the dead bodies of quail, which said quail had theretofore been killed in the Territory of Oklahoma in violation of the laws of said Territory and with the intent and purpose of being shipped and transported out of said Territory in violation of the laws of said Territory."

Except as to the date of the crime, and the railway to which the delivery was made, the indictment in case No. 45 is like that in case No. 43.

The charging part of the indictment in case No. 44 is as follows:

"That on, to-wit, the 30th day of November, in the year of Our Lord, one thousand nine hundred and six, in said County, and within the jurisdiction of said Court, Paris N. Rupert, then and there being, did then and there unlawfully, wilfully and feloniously deliver to the Rock Island Railroad Company, a common carrier, to be shipped and transported by Interstate Commerce 139 boxes and packages containing the dead bodies of quail which had theretofore been killed in the Territory of Oklahoma in violation of the laws of said Territory, and with the intent and for the purpose of being shipped and transported out of the Territory of Oklahoma and to the City of Chicago, in the State of Illinois, without having said boxes and packages plainly and clearly marked so that the address of the shipper and the nature and contents of the packages could be readily ascertained on the inspection of the outside of such boxes and packages."

The indictment in case No. 46 is the same as that in case No. 44 except as to the number of boxes of quail, and the railway company to which delivered.

After Oklahoma was admitted as a State, the cases were remitted to the District Court of the United States for the Western District in that State. There were demurrers to the indictment, which were overruled, pleas of not guilty entered, and the four cases were consolidated for trial purposes. A jury trial resulted in a verdict of guilty in every of the four cases. Motions for new trial, and motions in arrest of judgment were overruled, and judgment of a fine of one hundred dollars and costs were imposed against the defendant in each case. A writ of error was sued out to reverse the judgments.

MCPHERSON, District Judge, after stating the facts as above, delivered the opinion of the court.

The record contains that which purports to be the testimony, the charge of the court, instructions refused, objections, rulings and exceptions, with recitals of what occurred during the trial, including motions for a new trial. None of these are evidenced by a bill of exceptions, and are, therefore, not of record. We cannot consider any of them. The office and necessity of a bill of exceptions in all actions at law and in criminal cases have long been recognized by the profession and required by all Appellate Courts. The practice, whatever

it is, in Oklahoma as to bills of exception in actions at law and criminal cases, is of no effect here. The laws of the State do not control as to this. The common law, in conjunction with the United States Statutes, only must prevail. *Michigan Insurance Bank v. Eldred*, 143 U. S., 293, 298; *Fishburn v. R. R.*, 137 U. S., 60; *The Chateaugay Company, Petitioner*, 128 U. S., 544, 553; Revised Statutes of United States, Section 953, as amended by Act of June 5, 1900, (31 Stat. at Large, p. 270), Vol. 1 Compiled Statutes, p. 696. Courts make the records, and the Trial Judge must sign the Bill of Exceptions. The clerk is without authority to certify up anything, except that made of record by the orders of the court.

It therefore follows that the only questions we can consider are those pertaining to the indictment. The demurrers are to the same effect as the motion in arrest of judgment. And the motion in arrest of judgment is the same in every of the four cases, and is as follows:

"1.—That the indictment filed herein does not state facts sufficient to constitute a crime known and punishable under the laws of the United States.

"2.—That the law on which said indictment is based is unconstitutional and void."

It appears from the foregoing that in two of the cases, the indictments charge that the defendant wilfully and unlawfully delivered quail to a railway company for transportation from points within Oklahoma to Chicago, Illinois, which quail had theretofore been killed in Oklahoma in violation of the laws of said territory.

The indictments in the other two cases charge defendant with wilfully and unlawfully delivering to a railway, boxes containing the dead bodies of quail which had theretofore been unlawfully killed within the territory, which delivery was for the purpose of shipping said quail by interstate shipments, to-wit, to Illinois, and without having the boxes marked showing the contents.

Section 3, of the Act of Congress of 1900, (Lacey Act) provides that it shall be unlawful to ship from one State or Territory to another State or Territory any animals or birds when such animals or birds have been killed in violation of the laws of the State.

The local laws of the Territory of Oklahoma allowed quail to be killed during certain months, (from October 15th to February 1st). But the Oklahoma statutes prohibited the exportation of quail at any time. Therefore it follows that it was unnecessary for the indictment to allege in which months the quail were killed. It was lawful to kill quail in the Territory for use within the Territory during three and one-half months of every year. But it was unlawful every day of the year to kill quail for shipment elsewhere. So that any date within the statute of limitations could be alleged in the indictment. Section 1, of the Act of March 18, 1903, Oklahoma Laws.

The purpose of the Lacey Act as expressed in the statute, section one, "is to aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct."

Section four of that statute provides that all packages containing such dead birds, when shipped by interstate commerce, shall be plainly and clearly marked, so that the nature of the contents may be readily ascertained on the inspection of the outside of such packages. Or, to restate it, it was unlawful to kill at any time, if for the purpose of export, and such were the indictments in two of the cases. And it was unlawful to export without marking the packages making known the contents, and such were the other two indictments.

The familiar rule, that an indictment in charging a statutory crime, need only follow the language of the statute, will suffice, particularly when the words of the statute, fully, directly, and with certainty set forth all the elements of the crime. *Evans v. U. S.*, 153 U. S., 584; *Cochran v. U. S.*, 157 U. S., 286, 290; *Ledbetter v. U. S.*, 170 U. S., 606, 609.

There are exceptions to this form of pleading, when the statute does not with definiteness cover all the elements of the crime. *Keck v. U. S.*, 172 U. S., 434.

For a discussion of this question, and the holding by this court, see the case of *Morris v. United States*, as reported in 161 Fed., 672, 680. The contention of counsel for plaintiff in error that the recitals are not sufficiently specific, is not in accord with the authorities. The indictments are good as to form.

Quail belong to the State or Territory, or rather the people collectively thereof, and are subject to the local laws as to killing, and the times therefor, and the shipment. These propositions have been put at rest by the Supreme Court. *Geers v. Connecticut*, 161 U. S., 519; *Lawton v. Steele*, 152 U. S., 133. It is for the State Legislature to say when quail may be killed. It may provide that they shall not be killed at any time. It may provide that they may be killed for use at home only, and not killed for shipment out of the State, which if allowed would result in the extinguishment locally of such game.

And no one doubts the validity of game laws which prohibit killing of game on the lands of another. It is quite likely that every State of the Union has such laws, and such was the common law.

The individual having no ownership in the game, and allowed at certain times, if at all, to kill the same at certain places, for particular uses only, it does not become the general subject of commerce free from all inhibitions. And as Congress is vested with the power under the commerce clause to regulate commerce between the States, it has the power to provide that there shall not be unrestrained commercial intercourse.

Thus in *Cook v. Marshall County*, 196 U. S., 261, it was held that a state law limiting the right to sell cigarettes would be upheld, even though brought in from another State. This was so held, because the prohibition of the sale was a valid exercise of the police power of the State, and the Commerce Clause cannot be used to override that which is clearly within the police power of the State.

And so in *Manchester v. Massachusetts*, 139 U. S., 240, a statute regulating the taking of fish was upheld and enforced, when it was sought to avoid the statute by showing that the fish were carried to the ports of other States on a vessel licensed under national authority. And a like holding was made as to oysters in *McCready v. Virginia*, 94 U. S., 391. It is one thing to prohibit property from being carried out of the State, and another to prohibit property from being brought into the State. And yet in *re Rahrer*, 140 U. S., 545, the Supreme Court upheld the Act of Congress of August 8, 1900, commonly called the Wilson Bill, which makes intoxicating liquors when brought into the State subject to the local laws.

Such being the holdings, it surely follows that a congressional enactment like the Lacey Act, which makes it a crime to carry out of the State that which can be and is lawfully prohibited by local or state laws, must be upheld.

Our holdings are:

1. The Territory of Oklahoma had the authority to provide by legislation, as it did, that wild game such as quail, should not be shipped out of the State, even though the game was killed during the open season.

2. The Act of Congress is valid wherein it is declared that the shipment out of the Territory in violation of the territorial law, constitutes a crime under the national law.

3. And to aid in the detection of such crimes, Congress had the authority to provide that all such interstate shipments should be plainly marked so that any person by a casual inspection would know the contents of the package.

All four of the judgments brought to this court for review by writ of error, are

Affirmed.

AND IT IS SO ORDERED.

Filed March 5, 1910.

A true copy.

Attest:

[SEAL.]

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 40.

GEO. P. McCABE, Solicitor.

DEC 24 1910

OPINION OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO INVOLVING SALOON TRESPASS ON NATIONAL FOREST.

SYLLABUS.^a

1. UNITED STATES STATUTES—DEPARTMENTAL REGULATIONS THEREUNDER—CONSTITUTIONALITY.

On demurrer to an indictment for maintaining a saloon on a mining claim within the Cœur d'Alene National Forest in violation of a regulation of the Secretary of Agriculture forbidding it, the regulation having been authorized and its violation having been made punishable as a crime by the act of June 4, 1897, *Held*: The act is constitutional.

2. SAME—WITHDRAWAL OF NATIONAL FOREST LANDS THEREUNDER—EXTENT OF GOVERNMENTAL JURISDICTION OVER MINING CLAIMS THEREIN.

Where lands of the United States are administered for National Forest purposes under the act of June 4, 1897, and a mining location is thereafter made thereupon, the lands so located continue to constitute a part of the reserve, subject to the legal rights of the locator, and the Government is still empowered to protect such lands against waste and unlawful use.

3. SAME—SECTION 2322, REVISED STATUTES, INTERPRETED.

The words "exclusive enjoyment," as applied to the rights of mining claimants over the surface of their mining claims under section 2322 of the Revised Statutes, means exclusive enjoyment for mining purposes.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

UNITED STATES OF AMERICA, <i>Plaintiff</i> ,	} Opinion on amended	
<i>vs.</i>		
BASIL RIZZINELLI AND CHARLES RIZZINELLI,		
<i>Defendants.</i>	} demurrer to indictment.	

AUGUST 24, 1910.

C. H. Lingenfelter, United States Attorney; William M. Aiken, Assistant to the Solicitor; attorneys for plaintiff.

Featherstone & Fox, attorneys for defendants.

^a Not by the court.

DIETRICH, *District Judge*:

The defendants are charged with the maintenance of saloons upon mining claims within the limits of the Coeur d'Alene National Forest without a permit and in violation of the rules and regulations of the Secretary of Agriculture. The claims were duly located, subsequent to the creation of the forest reserve, and they are possessory only, no application for patent ever having been made. The technical sufficiency of the indictment is not called into question, but it is urged, first, that the provision of the statute upon which the rules referred to are founded is unconstitutional, and the rules therefore void, because the statute itself does not sufficiently define the acts to be punished and because it attempts to delegate to an executive officer legislative power; and, second, that even if the statute be held to be valid, it can not properly be construed as conferring authority upon the Secretary of Agriculture to make rules applicable to the lands embraced in valid mining claims, whether the same were located before or after the creation of the forest reserve.

The act of June 4, 1897 (30 Stat. L., 11, p. 35), to which the charge is primarily referred, and the validity of which the defendants attack, provides for the setting apart and maintenance of forest reservations for the purpose of protecting the forests and securing favorable conditions of water flow, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States. It is declared that—

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

And it is further provided as follows:

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

And further, as follows:

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been, or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

Subsequently, jurisdiction over forest reserves was transferred to the Secretary of Agriculture, who formulated an elaborate set of regulations, published in what is known as the "Use Book." The particular rules alleged to have been ignored by the defendants (Use Book, pp. 54, 67) are as follows:

REG. 6. Permits are necessary for all occupancy, uses, operations, or enterprises of any kind within National Forests, whether begun before or after the National Forest was established, except: (a) Upon patented lands; (b) upon valid claims for purposes necessary to their actual development and consistent with their character; (c) upon rights of way amounting to easements for the purposes named in the grants; (d) prospecting for minerals, transient camping, hunting, fishing, and surveying for lawful projects.

REG. 19. The following acts within National Forests are hereby forbidden: * * * (c) Erecting or conducting telephone, telegraph, or power lines, hotels, stores, sawmills, power plants, or other structures, or manufacturing or business enterprises, or carrying on any kind of work, except as allowed by law and National Forest regulations, and except upon patented lands or upon a valid claim for the actual development of such claim, consistent with the purposes for which it was initiated.

Although, in its general aspect, it is highly interesting and of the deepest concern, the constitutional question should, I think, be disposed of here, without extended discussion. It is one concerning which the trial courts are at variance. *United States vs. Domingo*, 152 Fed., 566; *United States vs. Deguirro*, 152 Fed., 568; *United States vs. Bale*, 156 Fed., 687; *United States vs. Matthews*, 146 Fed., 306; *United States vs. Grimaud*, 170 Fed., 205; and upon which, when recently presented, the court of last resort was equally divided. *United States vs. Grimaud*, 216 U. S., 614. The Circuit Court of Appeals of this circuit has unequivocally held the provision valid in its relation to civil rights. *United States vs. Shannon*, 160 Fed., 870. And while it is true that sometimes an administrative regulation may be given effect in the prosecution of a civil suit, and at the same time be rejected from the definition of a criminal offense, the principle of such distinction is, in the present case, not readily discernible. How-

ever that may be, in view of the existing diversity of judicial decision, and having respect for the familiar rule that all intendments are in favor of the validity of an act and that it should not be adjudged to be unconstitutional unless its repugnance to the Constitution clearly appears (*Buttfield vs. Stranahan*, 192 U. S., 470), I am of the opinion that under the principle of *stare decisis*, the question should be deemed to be ruled by *United States vs. Domingo*, *supra*, decided by this court (Judge Beatty presiding) in March, 1907, adversely to the contention of the defendants. It is highly important to the orderly administration of justice that in the same jurisdiction there be uniformity of decision; well considered precedents should be cast aside only for the most cogent reasons. The general rule which forbids judges sitting in the same court from ignoring, for light reasons, the decisions of each other, does not have its origin merely in motives of personal courtesy, but, as experience amply proves, rests upon considerations of a wise public policy. Any other course would tend to unseemly struggle in the courts, and would ultimately result in a weakening of public confidence in the soundness and finality of judicial decisions. *Reynolds vs. Iron Silver Mining Co.*, 33 Fed., 354; *Shreve vs. Cheesman*, 69 Fed., 785; *Taylor vs. Decatur M. & L. C. O.*, 112 Fed., 449; *Plattner Improvement Co. vs. International Harvester Co.*, 133 Fed., 376. While in these cases rules of property and of practice are especially referred to, the reasons here presented for uniformity of decision are equally if not more persuasive. True, there is directly involved only a comparatively unimportant right or privilege, but to yield to the defendants' contention is not only to render nugatory the expressed will of the legislative department relative to government policies of general application and of great interest, but also to withdraw from the executive department sanctions deemed to be important in the enforcement of regulations formulated for the protection and conservation of the public forests, however reasonable and necessary the same may be. Upon the whole, I think it is clear, that whatever conclusion I might reach upon a mature and independent consideration, the question should here be regarded as ruled by the *Domingo* case, and this being true, in view of the able discussions already to be found in the published decisions from the lower courts, and of the division of opinion in the Supreme Court, an elaborate consideration of the general question, as if it were of first impression in this jurisdiction, if not presumptuous, could, I am sure, be of no substantial service, and I therefore pass to the other branch of the case.

Concretely stated, the second question is whether or not, assuming that the maintenance of a saloon upon public lands within a national forest, to which no previous claim of any kind has attached, con-

stitutes a criminal offense, a like offense is committed when such a saloon is maintained upon forest reserve lands, embraced within a valid mining claim, located after the creation of the reserve.

By referring to the extracts above quoted from the statute, it will be noted that the authority conferred upon the Secretary to make rules is confined to the purpose of regulating the occupancy and use of, and the preservation of the forests upon, the reservations. Congress contemplated that settlers within the boundaries of the reservations should have the right of egress and ingress, and should be permitted to construct and maintain such roads and other improvements as are reasonably necessary for such purpose, and it was further contemplated that persons should, subject to the reasonable rules and regulations of the Secretary, have the right to go upon the reserve for all proper and lawful purposes, including that of "prospecting, locating, and developing the mineral resources thereof." In the last paragraph above quoted, which is the next to the last paragraph of the act, so far as it pertains to the subject of forest reserves, provision is made for the restoration to the public domain of any lands embraced within the limits of a reservation, which, after due examination, shall be found better adapted for mining or agricultural purposes than for forest usage. This provision doubtless has reference to the express declaration found in an earlier paragraph of the act, that it was not the purpose or intention of Congress to "authorize the inclusion of lands more valuable for the mineral therein or for agricultural purposes than for forest purposes," and imposes upon the Executive the duty to make such restoration where the prescribed conditions are shown to exist. The succeeding paragraph seems to confer unlimited authority upon the President by Executive order arbitrarily to modify the area, or change the boundary lines of any reserve, or to entirely vacate the order creating it. The only express reference in the act to the location of mining claims is found in the last sentence of the second paragraph above quoted, which in full is, "Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations," and the last sentence of the last paragraph above quoted, namely, "And any mineral lands in any forest reservation which have been, or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained."

It is the contention of defendants that the valid location of a mining claim *ipso facto* withdraws the land embraced therein from

the jurisdiction of the Secretary of Agriculture, and that therefore the rules under consideration are wholly inapplicable. Upon the other hand, the Government points to the fact that while qualified persons are authorized to locate claims upon lands containing valuable mineral deposits, within as well as without the boundaries of a reservation, there is no language in the act justifying the conclusion that by the location of a mining claim the lands embraced therein are withdrawn from the reservation, and much significance is attached to the clause which provides that the right to go upon reservations for "all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources," is expressly conditioned upon a compliance with the rules and regulations covering forest reservations.

For a definition of the rights of the locator upon public lands, both parties refer to section 2322 of the Revised Statutes of the United States, where it is declared that "the claimant shall have the exclusive right of possession, and enjoyment of all the surface (of the claim), and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward, vertically," etc. It is conceded by the Government that by the forest reserve act of June 4, 1897, Congress did not intend to, and did not, limit or qualify the rights of a locator, or confer any authority upon the Secretary of Agriculture, by regulation or otherwise, to limit or qualify such rights, or to intrude upon the exclusive possession or infringe upon the exclusive "enjoyment" guaranteed to the locator under section 2322; in short, that the rights of a locator of a mining claim within the boundaries of a forest reserve are substantially the same as those of one who locates such a claim upon the public domain. It is also conceded that the right of exclusive possession runs against the Government as well as against third persons. Obviously, therefore, the controversy is primarily confined to a consideration of the purpose to which the locator may ordinarily and under general law properly devote the surface possession of his mining claim, the defendants contending that they may use the same "for any purpose, whether the same be consistent with mining or not," and upon the other hand, the Government asserting that a locator is, under section 2322, authorized to use the surface of his mining claim only for purposes connected with or incident to the exploration and recovery of the mineral therein contained.

It is familiar law that the citizen may acquire any one of three possible estates in mineral lands upon the public domain. He may content himself with locating a claim in compliance with the statutes and rules and regulations, in which case he acquires a possessory title only, both the equitable and legal title remaining in the United

States; or, in the second place, after making such location, he may comply with the further requirements of the law, and pay the required purchase price, thus acquiring the equitable title, the legal title still remaining in the United States; or he may proceed one step further and obtain patent, thus divesting the Government of all interest, both legal and equitable.

The defendants here have the possessory title only. They have a distinct but qualified property right, and even if we assume that their interest is vested, it is one which may be abandoned at any moment, or forfeited. The primary title, the paramount ownership, is in the Government, and upon abandonment by the locator, or his failure to comply with the conditions upon which his continuing right of possession depends, the entire estate reverts to the Government; all the time it retains the title with a valuable residuary and reversionary interest. This interest, whatever it may be, it has the right to protect, and obviously the interest which it retains is the entire estate less that which is granted by the terms of section 2322, providing that locators shall have "the exclusive right of possession and enjoyment of all the surface of their locations." The true meaning of this granting clause it is therefore of fundamental importance to determine, for, by its terms, properly interpreted, the estate of the defendants in the lands which they occupy is to be measured, and, in the absence of any express declaration in the act of June 4, 1897, upon the nature and extent of this estate largely depends the question whether or not there is such incompatibility between the nature of a mining claim and the status of lands in a forest reserve that the valid location of the former operates to withdraw the lands embraced therein from the latter. The inquiry is substantially limited to the meaning of the phrase "*exclusive enjoyment*," for notwithstanding the existence of the Coeur d'Alene Forest Reserve it is conceded that the defendants are entitled to the exclusive possession of their claim not only as against third persons, but as against the United States. The Government is not seeking to qualify or limit the possession of the defendants or in any respect to intrude thereon, but only to restrict the uses to which such possession shall be devoted. The defendants have a right to the *exclusive enjoyment* of the surface of their claims, and our task is to determine what is meant by the word "enjoyment" as the name is used in the statute. It is not self-explanatory or unequivocal and must be interpreted in the light of the general purpose of the law in which it is found and in harmony with other provisions thereof. Consciously or unconsciously, we necessarily read something into the statute which is not therein expressed. We may differ as to what should be interpolated, but that there must be some interpolation may not be doubted. The Government inserts after the word "enjoyment" the phrase "for mining

purposes," and the defendants the phrase "for all purposes." No other language is suggested, and, indeed, no middle ground appears to be possible; the "enjoyment" is either for mining purposes alone or for all purposes, without qualification or restriction. Under a familiar rule of statutory construction the necessity of reading into the statute one or the other of these two phrases to make it complete, and its adaptability to either of them of itself operates strongly to determine the question in favor of the Government, for it is well settled that in public grants nothing passes except that which is clearly and specifically granted, and all doubts are to be resolved in favor of the Government. *Oregon R. & N. Co. vs. Oregonian Ry. Co.*, 130 U. S. 1; *Coosaw M. Co. vs. South Carolina*, 144 U. S. 550. But, independent of this rule, considerations pertinent to the construction of private grants and contracts clearly lead to the conclusion that the right of enjoyment which Congress intended to grant extends only to mining uses. The general purpose of the mineral laws is well understood; it was to encourage citizens to assume the hazards of searching for and extracting the valuable minerals deposited in our public lands. In form the grant is a mere gratuity, but in considering the propriety of such legislation it may well have been thought that by reason of the stimulus thus given to the production of mineral wealth and rendering the same available for commerce and the arts, the public would indirectly receive a consideration commensurate with the value of the grant. In that view doubtless the legislation has for a generation been generally approved as embodying a wise public policy. But under what theory should the public gratuitously bestow upon the individual the right to devote mineral any more than any other public lands to valuable uses having no relation to mining, and for what reason should we read into the statute such a surprising and unexpressed legislative intent? With much earnestness the consideration is urged that it has become more or less customary to erect valuable buildings upon lands embraced in mineral claims to be used for purposes having no necessary relation to mining operations, and that great hardship would ensue and important property rights would be confiscated if the locator's "enjoyment" of the surface be limited to uses incident to mining. But even if it be true, as suggested, that in many localities sites for dwelling houses and business structures could not be conveniently obtained except upon lands containing valuable mineral deposits and embraced in located claims, the fact is without significance and lends no support to the defendants' contention. If we assume that Congress was cognizant of or anticipated such conditions, we may further reasonably assume that it was thought that ample protection against embarrassment to the mining industry from such a source was furnished in other provisions of the law. At the same time the Government

confers upon the locator the right to possess and enjoy the surface of a mining claim for mining purposes without the payment of any consideration therefor it offers for a small consideration to convey to him the entire estate. The Government gives the mineral to him who finds it, and for purposes incident to the extraction thereof permits him to possess and use the ground in which it is found. It does not give him the ground, but empowers him to purchase it, and that he may do if he desires its permanent and unrestricted use. The unqualified title to the land embraced in a valid possessory claim thus being made available to the locator for the moderate prices prescribed by law, there is no force to the argument implied in this contention. Nor is there any merit in the suggestion that the custom of so using the surface of unpatented claims without objection from the Government is so prevalent as to imply assent or acquiescence on the part of Congress in its unrestricted use. In the absence of material waste it would not be strange if, as a general rule, officers of the Government should ignore the occupancy of such lands for purposes beyond those authorized by law, so long as it was without substantial injury. But such inaction serves neither to shed light upon the original legislative intent nor to confer on the occupant the legal right to continue such occupancy over the objection of the Government.

The rights of a locator of a mining claim and the nature of his estate therein have not infrequently been considered by the Supreme Court of the United States. That the discovery of valuable mineral and the proper location of his claim operate to vest in the locator a substantial interest may not be doubted. The interest thus acquired is a valuable property right, which may be mortgaged, transferred, inherited, and taxed; the right of possession is good against all the world, including the United States. *Gwillim vs. Donnellan*, 115 U. S., 45; *Manuel vs. Wulff*, 152 U. S., 505; *Belk vs. Meagher*, 104 U. S., 279; *Forbes vs. Gracey*, 94 U. S., 762; *St. Louis Mining Co. vs. Montana Mining Co.*, 171 U. S., 650; *Elder vs. Wood*, 208 U. S., 226. In some of these, and in other cases, meager expressions may be found incidentally touching upon the question here in controversy, but in none of them, so far as I am aware, was it either involved or discussed, and indeed there has come under my observation no reported case from any court in which the point may be said to have been decided, except possibly *United States vs. Teller*, 113 Fed., 273, where in a well-considered opinion, the Circuit Court of Appeals of the Eighth Circuit reached a conclusion which it is thought strongly supports the present contention of the Government. Speaking of the rights conferred by that part of the statute which we have been considering, the court says: "It gave him (the locator) nothing but the right of present and exclusive possession for the purpose of mining. It did not divest the legal title of the United States

or impair its right to protect the land and its product, by either civil or criminal proceedings from trespass or waste. * * * The two titles recognized by the United States confer totally different rights. The first one confers a right (and it may properly enough be said to be vested in the locator) to the possession of the land for the purpose of carrying on his mining operations as long as he performs the required conditions."

Holding, therefore, that the right of a locator of a mining claim to the "enjoyment" of the surface thereof is limited to uses incident to mining operations, no serious difficulty is encountered in reaching the further conclusion that forest reserve lands embraced in a mining claim continue to constitute a part of the reserve, notwithstanding the mineral location, subject, of course, to all the legal rights and privileges of the locator. The paramount ownership being in the Government, and it also having a reversionary interest in the possessory right of the locator, clearly it has a valuable estate which it is entitled to protect against waste and unlawful use. It is scarcely necessary to say that it is the substantial property right of the Government, and not the extent to which such right may be infringed in the present case, that challenges our consideration. The burden imposed upon the principal estate by the construction and maintenance of a little saloon building may be trivial, and the damage wholly unappreciable. But that is not to the point. If a worthless shrub may, as a matter of legal right, be destroyed in the location of a saloon, the entire claim may be stripped of its timber, however valuable, to give place for other saloons and other structures having no connection with the operation of the mine. To concede any such right at all, is necessarily to concede a right without limit; there is no middle ground. It is therefore repeated, that, subject to the locator's legitimate use for mining purposes, the Government continues to be the owner of the land, and is interested in conserving its value and preventing injury and waste. That being true, in the absence of express language evincing the intent of Congress to withdraw such lands from the jurisdiction of the forestry service, there is no reason to infer any such intent. Upon the other hand, it is much more reasonable to assume that Congress advisedly concluded to leave the Government's interest therein subject to the jurisdiction and under the protection of the department that is responsible for the care and protection of the surrounding lands and forests. The locator's rights are not curtailed; there is no intrusion upon his possession; his right of "enjoyment" is not necessarily qualified or infringed by the retention in the forest reserve. He may possess and utilize the entire claim, including the surface, for all the purposes and to the same extent, for and to which he could have possessed and used it if no forest reserve existed. To hold that the defendants

are indictable for maintaining a saloon upon their mining claim in the reserve is not to hold that their rights as locators are less because the lands are in the reservation than they would be if the claims were upon the open public domain. In neither case does the location of the claim confer the right to maintain a saloon thereon. The only difference is that a remedy is provided for in the one case which does not exist in the other. In both cases the Government has a remedy by way of civil action; upon the forest reserve, assuming the law to be valid, it has the additional remedy of a criminal prosecution, of which it is here availing itself.

In reaching this conclusion I have not thought it necessary to consider the precise meaning and application of that portion of the act of June 4, 1897, which recognizes the right of persons to enter upon the forest reservations "for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering the said forest reservations." At the oral argument there was some suggestion by counsel for the Government that in this language is to be found authority for the Secretary to make rules regulating mining operations carried on upon valid, located mining claims. The point, however, does not here call for any expression of opinion for it is not presently involved. The defendants are not charged with the violation of such a rule, and so far as I am advised no such regulations have been promulgated. The charge against the defendants is not of carrying on mining operations without a permit, but of transacting other business having no relation to such operations.

For the reasons stated, the demurrer will be overruled.

(The defendants were afterwards fined, having interposed pleas of "guilty.")

[Cir. 40]

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 41.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Opinion of Holland, J., of the Eastern District of Pennsylvania, in a Case Involving an Alleged Violation of the Act of June 30, 1906 (34 Stat., 768).

SYLLABUS OF THE OPINION.^a

1. Section 10 of the Food and Drugs Act, June 30, 1906, defines fully and clearly the conditions under which adulterated or misbranded articles of food and drug are liable to seizure, and it is unimportant, as far as forfeiture proceedings are concerned, whether or not any person could be convicted under section 2 of the act.

2. Section 2 of the Food and Drugs Act, June 30, 1906, defines what acts or omissions shall constitute a misdemeanor with respect to adulterated or misbranded articles of food and drug, and it is not necessary to refer to section 10 in order to ascertain whether a person has violated the provisions of this section. Sections 2 and 10 are distinct and independent of each other.

3. The taking of samples from an "original package" for the purpose of examination does not operate to incorporate the product into the general property of a state. The original character of the package is not destroyed and it is still to be regarded as in interstate commerce.

4. Products are liable to condemnation and forfeiture under section 10 of the Food and Drugs Act, June 30, 1906, on account of adulteration, only if the adulteration exists at the time seizure is effected. It is immaterial, for the purposes of this section, whether or not the product was adulterated at the time of shipment in interstate commerce.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA	}	Libels for Condemnation, No. 7 of 1910.
v.		
FIVE BOXES OF ASAFOETIDA.		

ON ANSWER TO LIBEL FOR FORFEITURE UNDER FOOD AND DRUGS ACT OF JUNE 30, 1906.

HOLLAND, *D. J.*

This libel is filed by the Government under the provisions of the Act of June 30th, 1906, for the purpose of effecting the condemnation of five boxes of asafoetida, which it is alleged were adulterated within the meaning of this Act of Congress. An attachment was issued and the drug seized by the Government, after which a claim was made by Smith, Kline & French Company, in whose possession the asafoetida was found, and an answer duly filed by them, in which the claimants urge that the libel be dismissed and that the drug seized under the attachment be returned to them.

^a Not by the court.

From the libel and answer, upon which the case was argued, we gather the following undisputed material facts:

On the Third day of May, 1910, T. M. Curtius, of the city of New York and State of New York, shipped via Clyde Steamship Company, a common carrier, five boxes of asafoetida to Smith, Kline & French Company, of the city of Philadelphia, in the State of Pennsylvania, for which at the time, the latter paid Curtius in full and received the asafoetida in their possession, at their place of business, No. 429 Arch Street, in this city. "Being a drug sold under a recognized name in the United States Pharmacopoeia", it was adulterated within the meaning of the Act of Congress at the time of transportation in that it differed from the strength, quality and purity as determined in the test laid down in the United States Pharmacopoeia official at the time of the investigation, in this: that the standard of strength, quality and purity determined by the test required that not less than 50 per cent of the asafoetida should dissolve in alcohol, and when incinerated, the said alcohol should yield not more than 15 per cent of ash, whereas less than 50 per cent of the asafoetida contained in these five boxes was soluble in alcohol, and when incinerated yielded more than 15 per cent of ash.

The claimants, immediately after the receipt of this asafoetida and before the service of the attachment, opened the packages and took therefrom sufficient for the purpose of examination, and caused the standard of strength, quality and purity to be plainly stamped upon the containers, as required by the Seventh Section of the Pure Food Act, and all the containers were so marked at the time of the service of the attachment. Smith, Kline & French Company, in whose possession the drug was found, were the owners thereof, having paid the full purchase price before the service of the attachment, but after its receipt they had never delivered it in original unbroken packages for pay, or otherwise, or offered to deliver it to any other person before the containers were duly marked as required by the Act.

Upon these facts the claimants urge that the libel should be dismissed, for the reasons (1) that no forfeiture could be had under Section 10 because under Section 2 the facts in this case would not support a criminal prosecution against the claimants; (2) that the taking of samples operated to remove the merchandise from the provision of the Act as "original packages"; and (3) that the proper labelling of the packages before seizure relieved them from liability to forfeiture under the terms of Section 10.

The provisions of the Act upon which the Government relies to enforce its claim for forfeiture of this merchandise, upon the facts as above stated, are as follows:

In Section 2 it is provided that the introduction into any state from any other state of any article of drug which is adulterated or mis-

branded within the meaning of this Act is hereby prohibited, and any person who shall ship or deliver for shipment from any state to any other state, or shall receive in any state from any other state, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of the Act, shall be guilty of a misdemeanor.

Section 7 provides:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopoeia or National Formulary, it differs from the standard of strength, quality or purity, as determined by the test laid down in the United States Pharmacopoeia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopoeia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopoeia or National Formulary.

And Section 10 provides that any article of drug that is adulterated or misbranded within the meaning of this Act, and is being transported from one state to another for sale, or having been transported, remains unloaded, unsold, or in original or unbroken packages, shall be liable to be proceeded against in any District Court of the United States within the District where the same is found, and seized for confiscation by a process of libel for condemnation.

It is obvious that the claimants could not be convicted of a misdemeanor as Section 2 requires not only that they should have received the adulterated or misbranded drugs from another state, which they have done in this case, but the Section further requires that after having so received it, they deliver it in unbroken packages, for pay or otherwise, or offer to deliver it to another person so adulterated or misbranded within the meaning of the Act, which they have not done. They have received it from another state, but they neither delivered nor offered to deliver it, for pay or otherwise, in the unbroken packages.

It is urged that by reason of the fact that a criminal prosecution could not be sustained against them, no forfeiture can be had under Section 10. We do not consider this contention sound, because Section 2 and Section 10 are not at all interdependent. The misdemeanor denounced in section 2 is entirely distinct and independent of the grounds of forfeiture in Section 10. Congress has clearly defined in Section 2 what acts or omissions shall constitute a misdemeanor with regards to adulterated or misbranded articles of food or drug, and in order to ascertain whether or not any person is guilty of having violated the provisions of this section, it is not at all necessary to refer to Section 10, as Section 2, as to what shall be deemed a misdemeanor, is complete within itself.

As to adulterated articles, it is a misdemeanor (1) to ship from one state to another; (2) to receive and deliver, or offer to deliver the same for pay, in unbroken packages. Such articles are liable to seizure and forfeiture under Sec. 10 (1) when in the course of being transported from state to state; (2) when having been transported they remain (a) unloaded, or (b) unsold, or (c) in the original packages.

It will be seen that Section 10 fully and completely defines the conditions under which such articles are liable to seizure and forfeiture. There is no reference to or dependence upon the misdemeanor defined in Section 2, and it is unimportant, as far as the forfeiture proceedings are concerned, whether or not any person could be convicted under Section 2. Congress has defined fully in Section 10 when and under what circumstances the article of food or drug shall be forfeited without reference to the guilt of the owner under section 2. Under the common law, the offender's right was not divested upon forfeiture proceedings until conviction, but this doctrine never was applied to seizures and forfeitures created by statute in rem for violations of the revenue laws of the government. The thing there is primarily considered the offender, or rather, the offence was attached primarily to the thing, and this whether the offence was *malum prohibitum* or *malum in se*. It therefore follows that when the thing is inculpatated under an in rem statutory provision it may be forfeited, although the act which caused the forfeiture was not authorized or done by or with the consent or knowledge of the owner. *Dobbins v. United States*, 96 U. S., 395; 19 Cyc. 1357.

The purpose of this Act is to conserve the public health by preventing interstate commerce in poisonous or deleterious foods and drugs, and in order that this may be effected, it is not only made a misdemeanor under the Act but the article of food or drug adulterated or misbranded is declared to be forfeited as an offending thing which threatens the health of the citizen and therefore subject to seizure without regard to the acts or knowledge of the owners or claimants.

Neither do we think that the taking of samples operated to remove the merchandise from the provision of the statute as original packages. There is no exact and comprehensive definition of the term, "original package". The cases heretofore considered involving this question have been disposed of by the application not of a precise definition but of certain broad general principles to the precise and particular facts.

An extract from the opinion of the Supreme Court in *Brown vs. Maryland*, 25 U. S. 419, is probably the nearest guide we may have as to what may be considered an original package. "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its

distinctive character as an import, and has become subject to the taxing power of the state."

In the case at bar, the claimants, upon receipt of these packages of asafoetida, merely took samples therefrom for the purpose of examination and in order that they might comply with the provisions of the Act in regard to causing the standard of strength, quality and purity to be plainly stamped upon the containers. This could not be considered to have destroyed the commercial form, and obviously did not operate to "incorporate" the same with the general property of this state.

A substantially similar question was presented to the Supreme Court of Iowa in 1895, in the case of *Wind vs. Iler & Co.*, 93 Iowa 316, in which case the bungs in certain barrels of liquor were drawn for the purpose of testing the contents before accepting the same by the purchaser, and the question was whether it was still to be regarded as interstate commerce. Upon this point the court said:

The question yet remains, did the drawing of the bung in the barrels in which the liquors were shipped into the state have the effect claimed for it by the appellant? We think not. The barrel was opened in order that a small quantity might be taken from it and tested,—not used,—in order to determine whether the liquors would be returned or not. We do not think that the inspecting or testing of an imported article to determine whether it shall be returned has the effect to make it a part of the general mass of property in the state.

This conclusion is supported by the decision in two well considered Federal cases.

The first case, *United States vs. Fox* (Federal Cases No. 15,155), decided in 1869, was a suit by the United States under the internal revenue act of July 13, 1866 (14 Stat. 144), to recover the penalties therein prescribed for the sale of perfumery without affixing a proper stamp thereon. A proviso in the act prescribed that when imported perfumery was sold in the original and unbroken package in which the bottle or other inclosure was packed by the manufacturer the person so selling should not be liable to the aforesaid penalty.

Fox sold one small wooden box containing twelve 1½ ounce bottles of hair oil and a similar but larger box containing twelve bottles of pomade. He opened both boxes, so that the purchaser might examine the contents. The top of the smaller box was put on again before delivery without change of the contents. In the larger box, containing the pomade, Fox, at the request of the purchaser, substituted three smaller bottles taken from the shelf of the store, and nailed up the box.

In respect to the smaller box of oil the court said:

Although the top of this box was taken off by the defendant Fox, it was only for the purpose of enabling the witness Quivey to ascertain the kind and quality of its contents, and before the sale and delivery to him it was put on again, with the con-

tents unchanged in kind or quantity. Under these circumstances the defendant must be considered as selling an unbroken package, the contents of which were not then required to be stamped.

But as to the sale of the box of pomade, the court said:

The package was opened, and three bottles being taken out of it, it was sold with only the remaining nine bottles in it. This was a broken package, and so the court instructed the jury.

The verdict of the jury in favor of the defendant, Fox, was set aside on motion of the United States, upon the ground that the package of pomade was not an original package, the court holding:

Goods are sold "in original and unbroken packages" within the meaning of the act of July 13, 1866 (14 Stat. 144), although the package is opened for inspection, if closed again before delivery without the contents being changed.

In the other case, *In re McAllister* (51 Fed. 282), decided in 1892, the facts were these: Two men, emissaries of a butter dealer in Baltimore, went to the store of McAllister, a dealer in oleomargarine, and sought to buy butter. McAllister stated that he had none, but could supply oleomargarine. They requested him to remove the lid from the tub of oleomargarine that they might look at it. He did so, stating that he could not sell less than ten pounds, as it reached him in the tub from Chicago. They purchased the tub and forthwith informed on him. He was duly tried in the State court and convicted. The State Court of Appeals affirmed the conviction, and McAllister applied to the Circuit Court of the United States for a writ of habeas corpus, on the ground that the sale of the tub of oleomargarine was a sale of an original package and beyond the power of the State to prohibit, which it sought to do in the act of the legislature. The court granted the writ and announced the proposition of law involved, in the following syllabus to the case:

Removing the lid of an original package of oleomargarine, so that a prospective buyer may examine its contents, is not such a breaking of the package as will destroy its original character.

In reaching the above conclusion the court said:

It is argued that the taking the lid from the tub containing this oleomargarine was a breaking of the package so as to destroy its original character. This in no sense did it do. The goods had in no way become commingled with his property or the general property of the State (*Low vs. Austin*, 13 Wall., 29). Anyone calling for oleomargarine with an honest purpose would have purchased this package as an original one, even if he knew it had had its lid lifted off once to see whether or not it held another substance than it purported to hold. The laws of the United States recognize oleomargarine as a merchantable article. Being such, while a State may perhaps regulate its sale, it cannot prohibit its importation. The statute in question does this, and is unconstitutional, and in this respect void. The petitioner is discharged.

In the light of the foregoing adjudications, it cannot be held that the mere taking of a sample from the original package for the pur-

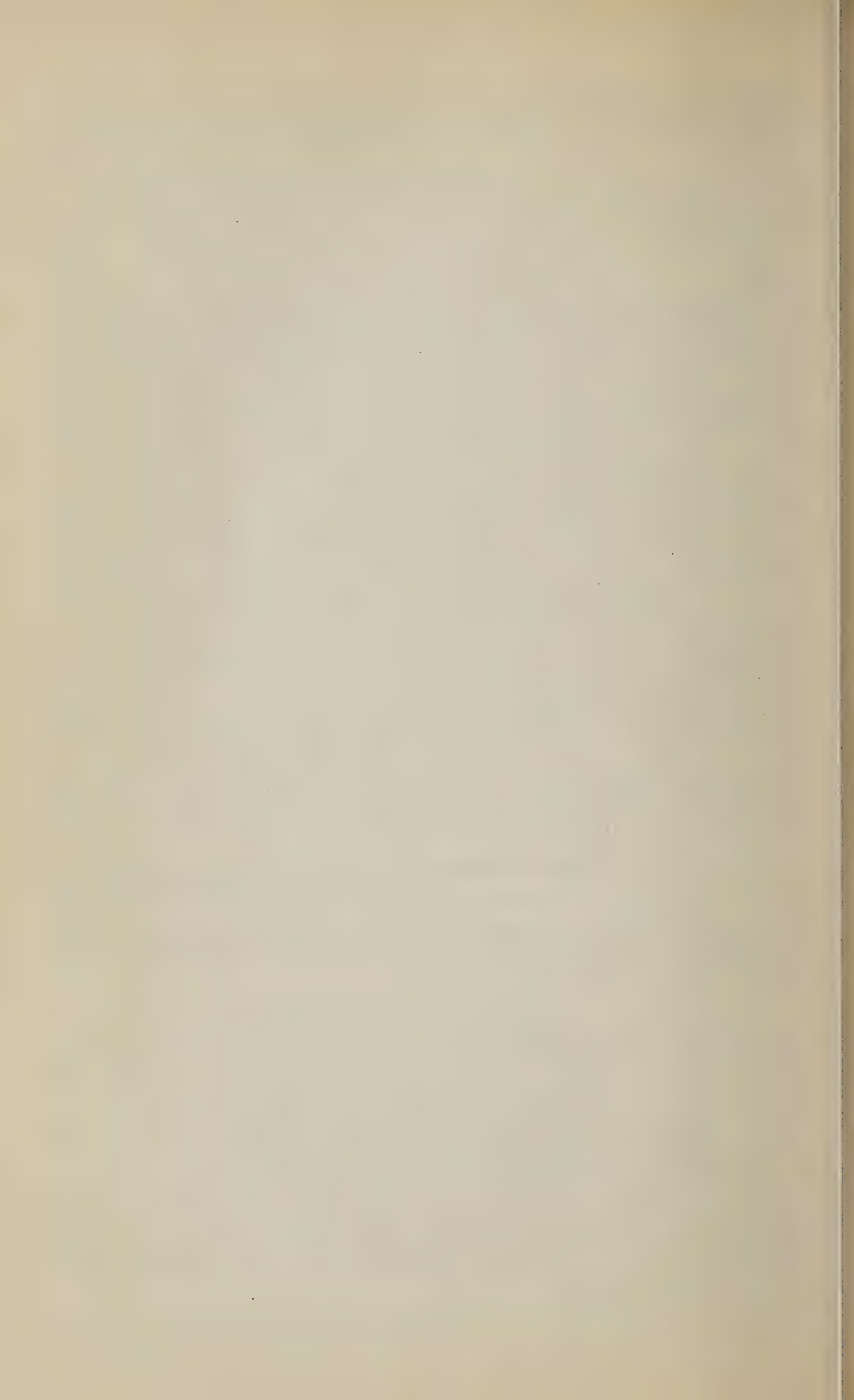
pose of examination and for the purpose of complying with the Act to plainly state upon the container the standard of strength, quality and purity of the drug was a breaking up of the original package and operated to incorporate the same in the general property of the state. The original character of the package was not, for the reasons stated by the claimants, destroyed.

The third defence interposed by the claimants, that the proper labelling of the packages before seizure relieved them from liability to forfeiture under the terms of Section 10, must be regarded as more substantial and as a good ground for dismissing the libel. Under this in rem statutory forfeiture procedure of Section 10, the article of drug itself is the thing inculpated, and it must be adulterated or misbranded within the meaning of the Act at the time the Government seizes it. It was not adulterated when seized, but branded as required by law. It is not sufficient that it was adulterated when it was being transported from one state to another and liable to forfeiture at that time. It was not then seized, and there is no language of the Act to authorize seizure for any past offending condition of the drug. A drug that "is" adulterated or misbranded (is the language used) and "is" being transported from one state to another for sale, shall be liable, &c. A drug which, "having been transported, remains unloaded, unsold, or in original unbroken packages," shall it be liable to forfeiture for some previous irregularity, if not adulterated or misbranded at the time of seizure? It is not so stated in the Act. There is no seizure of a drug that "was" adulterated authorized. Having been transported and remaining unloaded, unsold or in the original unbroken packages, it can only be forfeited when it "is" adulterated and misbranded when seized.

These boxes of asafetida when seized by the Government were not adulterated within the meaning of the Act. It is true they "had been transported" (from one state to another for sale) and "remained in the original unbroken packages at the time the Government seized them," but they were not adulterated.

Under Section 7 this asafetida was adulterated only in case its standard of strength, quality and purity was not plainly stamped upon the containers, but if so marked it was not adulterated. The liability to forfeiture of the drug, therefore, would depend upon whether or not the containers were so marked at the time the Government seized them. They were so marked and not liable to seizure.

The containers having been branded according to the requirements of the Act at the time of seizure, there is no valid ground for forfeiture, and the libel in this case is dismissed, and the Government is directed to return to the claimants the five boxes of asafetida seized under the attachment.



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 42.

GEORGE P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the District Court of the United States for the District of Nebraska, Omaha Division, in a case involving an alleged violation of the act of June 29, 1906 (34 Stat., 607).

SYLLABUS.^a

The proviso in section 3 of the 28-hour law is not satisfied, so as to relieve a carrier from unloading animals for food, rest, and water, as required by section 1, if it be shown that the animals could have had food, rest, and water, but it must appear that the animals did have proper food, water, space, and opportunity to rest in the cars, boats, or other vessels in which they were carried.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA,
OMAHA DIVISION.

UNITED STATES OF AMERICA, PLAINTIFF,	} Case No. 15. Doc. A.
<i>vs.</i>	
CHICAGO, BURLINGTON & QUINCY RAIL- road Company, defendant.	

THOS. C. MUNGER, *D. J.*

This is a suit to recover a penalty for failure to comply with the provisions of section 1 of the act of Congress approved June 29, 1906, known as the 28-hour law.

The defendant received for shipment a freight car of the ordinary box-car type containing household goods, farm implements, and some horses, cows, and hogs belonging to one shipper. The shipper signed what is known as a "Live-stock contract," permitting the shipper to ride on the train with the stock in order to care for the same. As a part of such contract the shipper agreed that the animals were in his sole charge during the shipment, for the purpose of attention and care of the animals, and that they were to be watered and fed by him. While admitting that the animals were confined in the cars for more

^a Not by the court.

than 28 consecutive hours without unloading for rest, water, and feeding, the defendant contends that it is not liable to a penalty because it is within the terms of the proviso in section 3 of the act of Congress, reading: "*Provided*, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply."

The evidence shows that the animals did not have proper food and water during the period of shipment. Those in charge of the train asked the shipper how he was faring, and he answered that he was "all right" and that he could feed and water his stock. No efforts other than these inquiries were made by the defendant's employees to ascertain whether the animals had food and water.

The defendant has not brought itself within the terms of the exception contained in section 3 of the act of Congress. Unless the animals "can and do have proper food, water, space, and opportunity to rest," the provisions in regard to their being unloaded apply.

It is not enough to show that the animals "can" have such supplies, as, for instance, that the one in charge may procure water and food at the stations where stops are made, but it must be shown that the animals "do" have proper food, water, space, and opportunity to rest in the cars, boats, or other vessels where carried. As this is not shown in this case a verdict will be directed against the defendant.

[Cir. 42]

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 43.

GEO. P. McCABE, Solicitor.

JAN 28 1911

THE TWENTY- EIGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Eighth Circuit, reversing the decision of the District Court for the Eastern District of Missouri in a case involving a violation of the Twenty-eight Hour Law. (Act of June 29, 1906; 34 Stat., 607.)

SYLLABUS.¹

CARRIERS—TWENTY-EIGHT HOUR LAW—RECOVERY OF PENALTY OF ANOTHER CARRIER NO DEFENSE.

It is no defense to a charge that a railroad company or a common carrier in transporting animals has confined them knowingly and willfully more than twenty-eight hours without unloading them, in violation of the Act of June 29, 1906, 34 Stat. 607, Chap. 3594, U. S. Comp. Stat. Supp. 1907, page 918, that another carrier that participated in the transportation of the same shipment was also guilty of a violation of the statute and has forfeited and paid the penalty therefor.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 3352.—September Term, A. D. 1910.

UNITED STATES OF AMERICA,	} In Error to the District Court of the		
<i>Plaintiff in Error,</i>		} United States for the Eastern Dis-	
<i>vs.</i>			} trict of Missouri.
WABASH RAILROAD COMPANY,			
<i>Defendant in Error.</i>			

Mr. Truman P. Young, Assistant United States Attorney (Mr. Charles A. Houts, United States Attorney, was with him on the brief), for Plaintiff in Error.

Mr. James L. Minnis, Mr. Wells H. Blodgett, and Mr. N. S. Brown appeared on brief for Defendant in Error.

Before SANBORN and VAN DEVANTER, *Circuit Judges*, and REED, *District Judge*.

SANBORN, *Circuit Judge*, delivered the opinion of the court.

Complaint is made because the court below overruled a demurrer to an answer which pleaded that the claim of the United States to

¹ Not by the court.

recover of the Wabash Railroad Company the penalty denounced by the twenty-eight hour law, 34 Stat., 607, Chap. 3594, U. S. Comp. Stat. Supp. 1907, page 918, for knowingly and willfully confining cattle during their transportation twenty-one hours without unloading them for rest, water and feeding when it knew that they had already been so confined sixteen hours by its connecting carriers, was satisfied and barred by the fact that the United States had recovered and received a penalty from the St. Louis Merchants Bridge Terminal Railway Company for its subsequent receipt from the defendant and confinement of these cattle about two hours while continuing their transportation from the terminus of the defendant's railroad in St. Louis to the national stockyards in Illinois. The case is conditioned by the material fact that the defendant received the cattle within the twenty-eight hour period and confined them beyond that period while the Terminal Company received them after that period had expired and confined them about two hours, but not beyond a second period of twenty-eight hours. An immaterial fact in the case is that the shipper had requested that the time of confinement be extended to thirty-six hours. As the defendant received the cattle when they had been confined but sixteen hours and kept them confined without unloading them until after the expiration of the thirty-six hours, this fact will not be further noticed and the case will be treated as though the limit was twenty-eight hours.

The argument in support of the answer is that the transportation, the offense, and the penalty are each single, that the action to recover the penalty is a civil action and that but a single penalty can be recovered for a confinement of a single shipment of cattle beyond the twenty-eight hours, and that as the penalty for this confinement has been collected of the Terminal Company the claim of the government for the violation of the law has been fully satisfied and no cause of action exists against the defendant. The briefs in this case contain much discussion of the question whether this is a civil or a criminal action. The majority of the court are of the opinion that it is a civil action on the authority of and for the reasons stated in the opinions in *Chicago, Burlington & Quincy Railway Co. v. United States*, 95 C. C. A. 642, 644, 645, 170 Fed. 556, 558, 559; *Hepner v. United States*, 213 U. S. 103, and *United States v. Southern Pacific Company*, 162 Fed. 412, and the cases there cited, while the writer is persuaded that while it is civil in form it is criminal in its nature on the authority of and for the reasons stated in *United States v. Shapleigh*, 4 C. C. A. 237, 241-245, 54 Fed. 126, 129-134; *United States v. Illinois Central R. R. Co.*, 156 Fed. 182, and *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 96 C. C. A. 646, 648, 649, 172 Fed. 194, 196, 197, and the cases there cited.

But is the cause of action for the penalty single so that but one penalty can be recovered for the confinement of a single shipment beyond the twenty-eight hours although several connecting carriers knowingly and willfully participated therein? The act of Congress reads, Section 1:

“That no railroad * * * whose road forms any part of a line of road over which cattle * * * shall be conveyed * * * shall confine the same in cars for a period longer than twenty-eight consecutive hours without unloading the same * * *. In estimating such confinement * * * the time during which the animals have been confined without such rest, food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours * * *.” Section 3: “That any railroad * * * who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars.” The defendant failed to comply with the first section of the act. It confined the cattle after a known confinement of sixteen hours, twenty-one hours more and thus violated the express prohibition of a confinement beyond twenty-eight hours and the declared purpose of the act. The statute clearly declares that every railroad that thus fails to comply with the act shall forfeit and pay the penalty. It does not provide that all railroads that in transporting a single shipment fail to comply with the act shall forfeit and pay this penalty, nor does it provide that every such railroad shall forfeit and pay the penalty except when some other railroad that participated in the shipment has already paid it. It reads that every railroad that violates the prohibition shall forfeit and pay a penalty. The interpretation of this act for which counsel for the Company contend would violate two familiar rules: When the language of a statute is unambiguous and its meaning is evident it must be held to mean what it plainly expresses and no room is left for construction. *Swarts v. Siegel*, 117 Fed. 13, 54 C. C. A. 399; *Knox County v. Morton*, 15 C. C. A. 671, 673, 68 Fed. 787, 789; *Railroad Company v. Sage*, 17 C. C. A. 558, 565, 71 Fed. 40, 47. Where the legislative department has created a right of action against a certain class of persons and made no exception it is not the province of the courts to do so. *Madden v. Lancaster County*, 65 Fed. 188, 195, 12 C. C. A. 566, 573; *Lafayette County v. Wonderly*, 92 Fed. 313, 316, 34 C. C. A. 360, 363. Our conclusion is that it is no defense to a charge that a railroad company or a common carrier in transporting animals has confined them knowingly and wilfully more than twenty-eight hours without unloading them in violation of the act of June 29, 1906, that

another carrier that participated in the transportation of the same shipment was also guilty of a violation of the statute and has forfeited and paid the penalty therefor.

It is unnecessary to a decision of this case to consider whether or not the Terminal Company, which confined these cattle two hours after they had been confined thirty-six hours, was guilty of any offense, and that question is dismissed. *United States v. Union Stockyards Company*, 162 Fed. 556, 561; *United States v. Stockyards Terminal Railway Company*, 178 Fed. 19, 24; *United States v. Stockyards Terminal Railway Company*, 172 Fed. 452; 25 opinions of Attorneys General, 411; *United States v. New York Central & H. R. R. Co.*, 156 Fed. 249; *United States v. Pacific Terminal Co.*, United States District Court, Oregon, December 21, 1909, not reported. The judgment must be reversed and the case must be remanded to the court below for further proceedings, and it is so ordered.

Filed October 25, 1910.

[Cir. 43]

O

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 44.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the United States Circuit Court for the Western District of New York in cases involving apparent violations of the Twenty-Eight Hour Law (Act of June 29, 1906; 34 Stat., 607).

SYLLABUS.¹

1. Where shipments of live stock are transported from one State of the United States through a foreign country, and into another State, the carrier handling them within the United States, at the last stage of the journey, is subject to the Twenty-eight Hour Law if at the time it accepts the stock the statutory limit has expired.

2. In addition to the penalty incurred by the initial carrier, any connecting carrier incurs a new penalty if it knowingly and willfully accepts and continues to transport live stock, theretofore confined by the initial carrier beyond the statutory period, without water, feed, or rest. (*U. S. v. Sioux City Stock Yards Co.*, 162 Fed., 556-561; *U. S. v. Stock Yards Terminal Co.*, 172 Fed., 452, 178 Fed., 19, not followed; *U. S. v. N. Y. C. & H. R. R. R.*, 156 Fed., 249; *U. S. v. St. Joseph Stock Yards Co.*, 181 Fed., 625; *U. S. v. Northern Pacific Terminal Co.*, 181 Fed., 879, followed.)

3. No penalty is incurred by a carrier if it accepts live stock simply for the purpose of unloading them for feed, rest, and water where they have been already confined beyond the statutory limit, provided the movement of such stock by the carrier is substantially a part of the process of unloading, and not a continuance of the act of transportation.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF NEW YORK.

UNITED STATES

against

LEHIGH VALLEY RAILROAD COMPANY (THREE CASES).

UNITED STATES

against

NEW YORK CENTRAL & HUDSON RIVER RAILROAD
Company.

UNITED STATES

against

MICHIGAN CENTRAL RAILROAD COMPANY.

UNITED STATES

against

GRAND TRUNK RAILWAY COMPANY OF CANADA.

John Lord O'Brian, United States Attorney.

Kenefick, Cooke, Mitchell & Bass (James McCormick Mitchell, of counsel) for defendant Lehigh Valley Railroad Company.

¹ Not by the court.

Hoyt & Spratt (Alfred L. Becker, of counsel) for defendants New York Central & Hudson River R. R. Co., and Michigan Central R. R. Co.

Moot, Sprague, Brownell & Marcy for defendant Grand Trunk Railway Company.

HOLT, *D. J.*:

These cases are brought to recover penalties under the act of June 29, 1906 (34 Stat. at L., pt. 1, 607), to prevent cruelty to animals while in transit by railroad, commonly called the 28 Hour Law.

In each of these cases cattle were shipped in cars from places in the State of Illinois or Michigan to Detroit, thence through Canada to Niagara Falls, and thence to places in the State of New York. In each case the cattle were confined in the cars more than 36 hours without being fed or watered or unloaded for rest, in violation of the statute. In some of these cases formal demurrers have been filed, and in the other cases it has been stipulated that they be deemed brought to trial and motions made to dismiss the complaint.

All these cases have been argued together, and in them two defenses are urged. One is that the 28 Hour Law does not apply to a shipment of cattle which passes from one State through a foreign country to another State. In some of the cases the claim is also made that the statutory period of confinement having expired before the cattle came into the defendants' possession, no liability under the act could be imposed upon them until an additional 28 or 36 hours had passed.

The claim that the 28 Hour Law does not apply to the case of a shipment of cattle through any foreign country is based upon the language of the act, which makes it an offense for any railroad company, transporting cattle or other animals from one State into or through another State, to confine them in cars for a period longer than 28 consecutive hours, without unloading them for water, feeding, and rest, for a period of at least five consecutive hours, with the provision that under certain circumstances 36 hours should be the limit of time. In short, the claim is that the words in the statute "from one State into another State" can not properly be held to include transportation from one State through a foreign jurisdiction into another State. It is claimed that Congress might have made the provisions of this statute applicable to foreign commerce; for example, that the act by its terms might have been made expressly applicable (1) to shipments originating in Canada and passing into and terminating in one of the United States; (2) to shipments originating in Canada, passing into the United States, and terminating in Canada; (3) to shipments originating in the United States, passing into Canada, and terminating in the United States. The defendants

claim that the act clearly does not apply to either of such cases, and that Congress intended not to legislate in respect to such cases, in view of the fact that Canada has a law for the prevention of cruelty to animals, and international complications might result from an attempt by the United States to deal with the question of such shipments. It is argued that as the law is well settled that transportation which originates and terminates in one State nevertheless constitutes interstate commerce if it passes in transit at any point beyond the boundaries of said State (*Hanley v. Kansas City Southern Ry. Co.*, 187 U. S., 617), it follows that when transportation passes beyond the boundaries of a single State into a foreign country and then terminates in the United States, it becomes foreign commerce, and that the 28 Hour Law does not assume to regulate foreign commerce, but only commerce between the several States.

The defendants' counsel, in support of this contention, also refers to the fact that several acts of Congress, dealing with questions arising under the commerce clause of the Constitution, expressly provide for such a case. Thus, the first section of the Act to Regulate Commerce, of 1887, provides that the provisions of that act shall apply to any common carrier engaged in the transportation of passengers or property "from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, *or from any place in the United States through a foreign country to any other place in the United States*, * * * or shipped from a foreign country to any place in the United States." The Arbitration Act, approved June 1, 1898, provides that the provisions of that act shall apply to any common carrier engaged in the transportation of passengers or property from one State to any other State, "or from any place in the United States through a foreign country to any other place in the United States." There is a similar provision in the Hours of Service Law, approved March 4, 1907.

Undoubtedly, if the 28 Hour Law had contained such a provision as is contained in the other statutes referred to, and had expressly provided that it should apply to the case of the transportation of cattle from any place in the United States through a foreign country to any other place in the United States, that would have been decisive of the question raised in this case, but I can not think that the mere omission of that expression in the act justifies the inference that Congress did not intend to have the 28 Hour Law apply to such a case. These shipments of cattle came within the literal provisions of the law. They were shipments from one State into another State. The fact that, in the course of such shipment, they passed through the Dominion of Canada did not alter the fact that the shipments were

from places in the State of Illinois or Michigan to places in the State of New York. The railway routes from Detroit to Niagara Falls, through the Province of Ontario, form parts of great standard railroad lines from Chicago and the West to New York. Congress concededly had the power to regulate shipments over such a line. The object of the act was obviously to prevent cruelty to animals, to protect the property of shippers, and to prevent injury to the public health from the sale for food of cattle made ill and feverish by hunger, thirst, and exhaustion. I can not believe that Congress intended to impose a penalty for such cruelty to animals on a line from Chicago to New York, which passes entirely through the United States, and not impose any penalty for similar cruelty on another line from Chicago to New York which between Detroit and Niagara Falls passes through Canada. If such a distinction be recognized, it will be possible for the shippers, and the railroads themselves, to avoid all liability under the act, in transporting cattle from Chicago to New York, by shipping them all by the routes which pass through Canada.

It may be that the omission of any provision in the 28 Hour Law for the punishment of cruelty to animals shipped from Canada into the United States was intentional. Congress may have taken into consideration the fact that Canada has a similar law, and may have intended to avoid any international complications which might arise in such cases. But I can not think that Congress intended to exempt from the operations of the act such shipments between points in the Western and Eastern States, as during a part of the trip, happened to pass through Canada, especially in view of the fact that cattle upon such routes are usually taken through in sealed cars, bonded under the customs laws. Such a shipment is in fact from a State to a State. The provisions in the other acts cited, specifically providing for the case of a shipment from a State through a foreign country to another State, may be considered as having been inserted in those acts from excessive caution. In my opinion, its omission from the 28 Hour Act does not necessarily imply that such a shipment does not come within the provision of the act.

In some of these cases the period of 28 hours, during which the animals were confined without food or water or being unloaded for rest, expired before the delivery of the cattle by the connecting road to the defendant, and it is claimed in those cases that the statutory penalty having been incurred while the cattle were in the possession of the connecting line, no new penalty can be imposed upon the defendant until an additional period of 28 hours after the delivery of the cattle to the defendant had passed. This view of the operation of the act has been taken by Judge Reed, in the Circuit Court of Iowa, in *United States v. Sioux City Stock Yards Co.* (162 Fed., 556, 561),

and by Judge Willard, in the Circuit Court of Minnesota, in *United States v. Stock Yards Terminal Co.* (172 Fed., 452). The latter case, upon appeal to the Circuit Court of Appeals for the Eighth Circuit, was affirmed (178 Fed., 19); but the ground upon which the affirmance was put by Judge Riner, who wrote the opinion of the majority, was that the proof showed that the defendant did not know that the cattle had been confined without unloading for a period in excess of 28 hours before it received them, and that, therefore, it had not knowingly and willfully violated the act. Judge Sanborn, who concurred in the decision, also held that the defendant was not guilty of any offense, on the ground that one offense had already been committed before the defendant received the cattle, and that it could not "commit a second offense by prolonging the confinement of the cattle over the 36 hours unless they confined them 28 hours more." An exactly contrary view is taken by Judge Hazel in *United States v. N. Y. C. & H. R. R. Co.* (156 Fed., 249); by Judge McPherson, in *United States v. St. Joseph Stock Yards Co.* (181 Fed., 625), and by Judge Wolverton in *United States v. Northern Pacific Terminal Co.* (181 Fed., 879).

These are all decisions by courts of first instance, except the decision by the Circuit Court of Appeals for the Eighth Circuit, in *United States v. Stock Yards Terminal Ry. Co.* (178 Fed., 19), and in that case the majority of the court affirmed the judgment on the ground that there was no proof that the defendant had knowingly and willfully violated the act, and expressed no opinion on the question whether, one penalty having been incurred by the connecting carrier, the defendant could incur another penalty until the additional 28 hours of confinement had passed. In this condition of conflicting authority, I think that it is obviously my duty to decide the question according to my own convictions. With the highest respect for the eminent judges expressing the contrary opinion, I think that any railroad company which takes from a connecting road cattle that have been confined without food, water, or unloading more than 28 or 36 hours, as the case may be, and which knowingly and willfully continues to transport them, immediately incurs a new penalty. The act in terms expressly provides that "in estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of 28 hours." The thing intended to be prevented by this legislation was cruelty to the animals, and as the act expressly provides that the time during which the animals have been confined on connecting roads shall be included,

I think that the act clearly makes it the duty of any railroad receiving animals, knowing them to have been confined longer than the statutory term, to unload, water, and feed them, and give them time to rest. The counsel for the defendant urged that, if this view be taken, the mere receipt of such animals immediately imposes a liability upon the receiving road; that, as the term of confinement has been already exceeded, a further confinement for an instant makes the receiving road liable. But the act should be reasonably construed. It provides that, in estimating such confinement, the time consumed in loading and unloading shall not be considered, and therefore if a road receiving animals which have been confined longer than the statutory period proceeds with reasonable speed to unload, water, and feed them, in my opinion no penalty will be incurred. The fact that it may be necessary to move the cars containing them a short distance to the yards would not necessarily involve a penalty. The question would be, Is the movement substantially a part of the process of unloading, or is it a continuance of transportation? If this construction of the act makes it necessary for railroads engaging in the transportation of cattle to provide suitable yards at which cattle can be unloaded, at the point where the roads connect with other roads, that must be done. Such a requirement seems to me entirely reasonable, in view of the very large number of cattle shipped over long distances in this country, and the possibility of their suffering great cruelties during such transportation.

It is urged in behalf of the defendants that if the time occupied in the transportation of the cattle through Canada is included in computing the period of detention, the effect will be to give to this law an extraterritorial force. The general rule is, of course, fundamental that the penal laws of one country have no force in another country. But, in my opinion, that rule has no application in these cases. The offense with which these defendants are charged is continuing the confinement of the cattle in this State after the term of confinement permitted by the statute has expired. It is, of course, true that their confinement in New York would not have constituted an offense without their previous confinement, part of which was in Canada; but the previous confinement in Canada or elsewhere is not a part of the offense, although a fact necessary to its existence. There are various cases in which the question whether an act constitutes a crime depends upon the question whether certain previous acts have occurred. Take, for instance, the crime of receiving stolen property. The property must have been stolen; but the crime consists in receiving it, knowing it to have been stolen. It is immaterial where the theft took place. It would be no defense to prove that it took place in another State or country, nor would the punishment of a man con-

victed in such a case violate the rule that criminal statutes have no extraterritorial force. Suppose a man were prosecuted criminally for cruelty to a horse by working the horse with a galled back. Would it be a defense to prove that the horse's back became galled originally while working in a foreign country? This case seems to me in principle the same as those at bar.

My conclusion is that there should be judgment for the United States in each of these cases. In the three cases against the Lehigh Valley Railroad Company the demurrers are overruled, with leave to answer within 20 days upon payment of costs. In the cases against the New York Central & Hudson River Railroad Co. and the Grand Trunk Railway Company of Canada, the motions to dismiss the complaint are denied. In the case against the Michigan Central Railroad Company, which is submitted for final judgment on proofs taken, the evidence shows a case of serious cruelty. Twenty-three horses were confined in a car for a period of over 40 hours without food, water, or rest, in extremely cold weather, with the result that one of the horses died and all suffered severely. I think that there should be judgment for the plaintiff for \$500, the extreme penalty provided in the act.

JANUARY 9, 1911.

[Cir. 44]



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 45.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Supreme Court of the United States affirming decree rendered by District Court of the United States for the Southern District of Illinois, in a proceeding by way of libel for condemnation and forfeiture under section 10 of the food and drugs act, June 30, 1906 (34 Stat., 768).

SUPREME COURT OF THE UNITED STATES.

No. 519.—OCTOBER TERM, 1910.

HIPOLITE EGG COMPANY, CLAIMANT OF Fifty Cans, more or less, of Preserved Eggs, Plaintiff in Error, <i>vs.</i> THE UNITED STATES.	}	In error to and on ap- peal from the District Court of the United States for the Southern District of Illinois.
--	---	---

[March 13, 1911.]

Mr. Justice McKENNA delivered the opinion of the Court.

The case is here on a question of jurisdiction certified by the District Court.

On March 11, 1909, the United States instituted libel proceedings under section 10 of the act of Congress of June 30, 1906, (34 Stat. L. 768,) against fifty cans of preserved whole eggs, which had been prepared by the Hipolite Egg Company of St. Louis, Missouri.

The eggs, before the shipment alleged in the libel, were stored in a warehouse in St. Louis for about five months, during which time they were the property of Thomas & Clark, an Illinois corporation engaged in the bakery business at Peoria, Ill.

Thomas & Clark procured the shipment of the eggs to themselves at Peoria, and upon the receipt of them placed the shipment in their storeroom in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended

for sale in the original, unbroken packages or otherwise, and were not so sold. The Hipolite Egg Company appeared as claimant of the eggs, intervened, filed an answer, and defended the case, but did not enter into a stipulation to pay costs.

Upon the close of libellant's evidence, and again at the close of the case, counsel for the Egg Company moved the court to dismiss the libel on the ground that it appeared from the evidence that the court, as a Federal court, had no jurisdiction to proceed against or confiscate the eggs, because they were not shipped in interstate commerce for sale within the meaning of section 10 of the food and drugs act, and for the further reason that the evidence showed that the shipment had passed out of interstate commerce before the seizure of the eggs, because it appeared that they had been delivered to Thomas & Clark and were not intended to be sold by them in the original packages or otherwise.

The motions were overruled and the court proceeded to hear and determine the cause and entered a decree finding the eggs adulterated, and confiscating them. Costs were assessed against the Egg Company.

The decree was excepted to on the ground that the court was without jurisdiction *in rem* over the subject matter, and on the further ground that the court was without jurisdiction to enter judgment *in personam* against the Egg Company for costs.

The jurisdiction of the District Court being challenged, the case comes here directly.

Section 2 of the food and drugs act prohibits the introduction into any State or Territory from any other State or Territory of any article of food or drugs which is adulterated, and makes it a misdemeanor for any person to ship or deliver for shipment such adulterated article, or who shall receive such shipment, or, having received it, shall deliver it in original unbroken packages for pay or otherwise.

In giving a remedy section 10 provides that if "any article of food that is adulterated and is being transported from one State . . . to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, . . . shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation . . . The proceeding of such libel cases shall conform, as near as may be, to the proceedings in admiralty . . . and all such proceedings shall be at the suit of and in the name of the United States."

The shipment to Thomas & Clark consisted of 130 separate cans, each can corked and sealed with wax. The eggs were intended to be used for baking purposes. The only can sold was that sold to the

inspector for the purpose of having the eggs analyzed. They contained approximately two per cent of boric acid, which the court found was a deleterious ingredient, and adjudged that they were adulterated within the meaning of the food and drugs act of June 30, 1906, (34 Stat. L. 771.)

The Egg Company, whilst not contending that the shipment of the eggs was not a violation of section 2 of the act, and a misdemeanor within its terms, and not denying the power of Congress to enact it, presents three contentions: (1) Section 10 of the food and drugs act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product. (2) A United States District Court has no jurisdiction to proceed *in rem* under section 10 against goods that have passed out of interstate commerce before the proceeding *in rem* was commenced. (3) The court had no jurisdiction to enter a personal judgment against the Egg Company for costs.

It may be said at the outset of these contentions that they insist that the remedies provided by the statute are not coextensive with its prohibitions, and hence that it has virtually defined the wrong and provided no adequate means of punishing the wrong when committed. Premising this much, we proceed to their consideration in the order in which they have been presented. The following cases are cited to sustain the first contention: *United States v. Sixty-five Casks of Liquid Extracts*, 170 Fed., affirmed by the Circuit Court of Appeals in *United States v. Knowlton Danderine Company*, 175 Fed. 1022, and *United States v. Forty-six Packages and Boxes of Sugar*, in the District Court for the Southern District of Ohio, not yet reported.

The articles involved in the first case were charged with having been misbranded and consisted of drugs in casks, which were shipped from Detroit, Michigan, to Wheeling, West Virginia, there to be received by the Knowlton Danderine Company in bulk in carload lots and manufactured into danderine, of which no sale was to be made until the casks should be emptied and the contents placed in properly marked bottles.

It was contended that the articles, not having been shipped in the casks for the purpose of sale thus in bulk, but shipped to the owner from one State to another for the purpose of being bottled into small packages suitable for sale, and when so bottled to be labeled in compliance with the requirements of the act, were not transported for sale, and were therefore not subject to libel under section 10 of the act.

The contention submitted to the court the construction of the statute. The court, however, based its decision upon the want of power in Congress to prohibit one from manufacturing a product

in a State and removing it to another State "for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles, to be legally branded when so manufactured;" and concluded independently, or as construing the statute, that the danderine company, being the owner of the property, shipped it to itself and did not come within any of the prohibitions of the statute. The case was affirmed by the Circuit Court of Appeals, 175 Fed. 1021. The court, however, expressed no opinion as to the power of Congress. It decided that the facts did not exhibit a case within the purpose of the statute, saying: "No attempt to evade the law, either directly or indirectly or by subterfuges, has been shown, it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing for the purpose of completing the preparation of the same for the market. Under the circumstances disclosed in this case, having in mind the object of the Congress in enacting the law involved, we do not think the liquid extracts proceeded against should be forfeited. In reaching this conclusion we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court."

In *United States v. Forty-six Packages and Boxes of Sayer* the court construed the statute as applying only to transportation for the purpose of sale. To explain its view the court said: "Following the words 'having been transported' is an ellipse, an omission of words necessary to the complete construction of the sentence. These words are found in the preceding part of the section and, when supplied, the clause under which this libel is filed reads and means, 'any article of food, drug or liquor that is adulterated or misbranded within the meaning of this act, having been transported from one State to another *for sale* [market purposes], remains unloaded, unsold, or in original, unbroken packages, . . . shall be liable.'" etc. And the court was of opinion that this view was in accord with the other two cases which we have cited. This may be disputed. It may well be considered that there is no analogy between an article in the hands of its owner or moved from one place to another by him, to be used in the manufacture of articles subject to the statute and to be branded in compliance with it, and an adulterated article *itself* the subject of sale and intended to be used as adulterated in contravention of the purpose of the statute.

A legal analogy might be insisted upon if cakes and cookies, which are the compounds of eggs and flour which the record presents, could be branded to apprise of their ingredients like compounds of alcohol. The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold or in origi-

and interest perhaps. These situations are clearly separate, and we cannot state or qualify them by the purpose of the owner to be a sale. It would, may be asked in what manner a sale? The questions suggest that we might accept the condition, and yet the nature of this would be within the statute. All articles, compound or single, not intended for consumption by the producer, are designed for sale, and because they are, it is the concern of the law to have them pure.

It is, however, insisted that "the proceeding *in personam* authorized by the law was intended so, and so soon as capable of going full force and effect to the law"; and, further, that a producer in a State is not interested in an article shipped from another State which is not intended to be sold or offered for consumption until it is manufactured into something else. The argument is peculiar. It is contrary to the interest of a producer or consumer that the article which he receives, no matter whence it come, shall be pure, and the law seeks to secure this interest, not only through personal penalties but through the condemnation of the article if impure. There is nothing inconsistent in the remedies, nor are they dependent. The First Federal, 250 U.S. 1, 2.

The first contention of the Egg Company is, therefore, unavailing.

Under this contention it is said that "the jurisdiction of the field and drugs act in question can go no further than the power given to Congress: under which it was enacted," and that the District Court, therefore, "had no jurisdiction" in 1908 because at the time of the seizure the eggs had passed into the general mass of property in the State and out of the field covered by interstate commerce.

To support the contention, *Waring v. The Mayor & Ward, City of New York*, is cited. That case involved the legality of a tax imposed by an ordinance of the city of New York upon merchants and masters of the city, equal to one-half of one per cent on the gross amount of their sales, whether the merchandise was sold at public or private sale. *Waring* was fined for non-payment of the tax, and he brought suit to restrain the collection of the tax, alleging that he was exempt from the tax on the ground that the eggs were in his care in packages in the original packages, imported from a foreign country, and which was purchased by him in entire ignorance of the consequences of the law, pending vessels before their arrival, or while the vessels were in the lower harbor of the port. He obtained a decree in the trial court which was reversed by the Supreme Court of the State of New York. A writ of error was issued out from this court and the decree was affirmed on the ground that *Waring* was not the shipper or consignee of the imported merchandise, nor the first vendor of it, and it was the settled law of the court "that merchandise in the original packages was sold by the importer as *wholesale* or *other* property."

citing *Brown v. Maryland*, 12 Wheat. 443; *Almy v. California*, 24 How. 173; *Pervear v. Commonwealth*, 5 Wall. 479. This also was said:

When the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer. Importers selling the imported articles are shielded from any such State tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import.

This case is clear as far as it goes, but the facts are not the same as those in the case at bar.

In the case at bar there was no sale of the articles after they were committed to interstate commerce, nor were the original packages broken. Indeed, it might be insisted that we need go no farther than that case for the rule of decision in this. It affirms the doctrine of original packages which was expressed and illustrated in previous cases and has been expressed and illustrated in subsequent ones. It is too firmly fixed to need or even to justify further discussion, and we shall not stop to affirm or deny its application to the special contention of the Egg Company. We prefer to decide the case on another ground which is sustained by well-known principles.

The statute declares that it is one "for preventing . . . the transportation of adulterated . . . foods . . . and for regulating traffic therein;" and, as we have seen, section 2 makes the shipper of them criminal and section 10 subjects them to confiscation, and, in some cases, to destruction, so careful is the statute to prevent a defeat of its purpose. In other words, transportation in interstate commerce is forbidden to them, and, in a sense, they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the State. Certainly not, when they are yet in the condition in which they were transported to the State, or, to use the words of the statute, while they remain "in the original, unbroken packages." In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.

The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the States to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it

must be remembered, with illicit articles, articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part of the general mass of property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and state power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution. *McCulloch v. Maryland*, 4 Wheat. 316; *Lottery Case*, 188 U. S. 321, 355.

3. Had the court jurisdiction to adjudge costs against the Egg Company? This is contended, and in support of the contention the claimant assimilates this proceeding to one in admiralty. In consequence, it may be supposed of the provisions of section 10 of the food and drugs act that the proceedings "shall conform, as near as may be, to the proceedings in admiralty," and *The Monte A*, 12 Fed. 331, and *The Alida*, Id. 343, are cited as deciding that in a proceeding *in rem* the court has no jurisdiction to assess the costs *in personam* against the claimant, who simply files an answer, but who does not enter into a stipulation to pay the costs of the proceeding. Too broad a deduction is made from these cases. They undoubtedly decide that a

process *in rem* and *in personam* cannot be joined in admiralty in the same libel, but it was not held that this was because of a want of jurisdictional power in the court. Such view was disclaimed in *The Monte A*, and to show that the framing of a libel against the owner *in personam* and against the vessel *in rem* was not jurisdictional, the court said that a breach of a contract of affreightment could have been so framed "long before the adoption of the Supreme Court rules in admiralty."

It is stated in Benedict's Admiralty, section 204, that "the distinction between proceedings *in rem* and *in personam* has no proper relation to the question of jurisdiction." It may be, as stated in section 359 of the same work, that "in a suit *in rem*, unless some one intervenes, the power and process of the court is confined to the thing itself and does not reach either the person or property of the owner." If, however, the owner comes in, or an intervenor does, his appearance is voluntary. He becomes an actor and subjects himself to costs, and this even if his ownership be averred in the libel. *Waple Proceedings In Rem*, page 100 *et seq.* 73; *United States v. 422 Casks of Wine*, 1 Pet. 547.

And such seems to be the necessary effect of Admiralty Rules 26 and 34. It is provided (Rule 34) that if a third person intervene, for his own interest, he is required to give a stipulation with sureties to abide the final decree rendered in the original or appellate court. It is in effect conceded that if such a stipulation be given, a judgment for costs can be rendered. But, upon what theory? The concession confounds the relation between the stipulation and the judgment, and makes the security for the payment of the judgment the source of jurisdiction to render it—jurisdiction according to the contention, which the court does not have as a Federal court.

Even, therefore, upon the supposition that the principles of the admiralty law are to apply to the proceedings under section 10, we think the court had jurisdiction to render a judgment for costs against the Egg Company.

So far our discussion has been in deference to the contention of the Egg Company, but it is disputable if the certificate presents a question of jurisdiction as to costs. The District Court gets its jurisdiction of the cause from section 10 of the food and drugs act, and whether the libel may be *in rem* and *in personam*, or whether a personal judgment for costs can be rendered, may be said to be simply a question of the construction of the section, and not one which involves the jurisdiction of the court. In other words, the rulings of the court may be error only, not in excess of its power. It certainly had jurisdiction of the person of the Egg Company.

Decree affirmed.

Issued April 14, 1911.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 46.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Supreme Court of the United States, Reversing Decision of the Circuit Court of Appeals for the Sixth Circuit, in Cases Involving Apparent Violations of the Twenty-eight Hour Law (Act of June 29, 1906; 34 Stat., 607).

SUPREME COURT OF THE UNITED STATES.

Nos. 7 and 8.—OCTOBER TERM, 1910.

THE BALTIMORE AND OHIO SOUTHWESTERN Railroad Company, Plaintiff in Error, <i>vs.</i> THE UNITED STATES.	In error to the United States Circuit Court of Appeals for the Sixth Circuit.
--	--

[March 20, 1911.]

“The act to prevent cruelty to animals while in transit,” approved June 29, 1906, (34 Stat. L. 607,) provides:

“SEC. 1. That no railroad * * * whose road forms any part of a line of road over which cattle * * * or other animals shall be conveyed * * * in interstate commerce * * * shall confine the same in cars, boats or vessels of any description for a period longer than 28 consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by * * * unavoidable causes * * * *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to 36 hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their con-

tinuous confinement beyond the period of 28 hours, except upon the contingencies hereinbefore stated * * *.

"SEC. 2. That animals so unloaded shall be properly fed and watered during such rest * * *.

"SEC. 3. That any railroad * * * which knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars * * *.

"SEC. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States * * *."

Under this act eleven actions were instituted in the Southern District of Ohio against the Baltimore and Ohio Southwestern Railway Company.

The complaint in each case gave the name of the station in Illinois from which the animals were shipped to Cincinnati, the marks of the cars in which they were shipped, the hour on February 2, 1907, when they were loaded, and the various periods of confinement, which varied from 37 to 45 hours. The separate shipments consisted of one, two, three, and four carload lots, aggregating twenty-one cars, containing several hundred cattle and hogs. Most of the shipments were loaded at different times; but because one (1872) was forwarded under the 36-hour rule, the time for its unloading was the same as that of another shipment (1871), made eight hours later under the 28-hour rule, from a different station. At another station there were three shipments of one carload each of cattle, belonging to different owners loaded at the same time, but two (1869, 1873) of the cars were forwarded under the 28-hour rule and the other (1874) under the 36-hour rule.

The railroad company filed a separate plea in each case, admitting the allegations of the complaint, but setting up that "the shipment therein was forwarded to Cincinnati on its train No. 98, on which there were also loaded and forwarded other cattle, referred to in each of the other suits, and in the said several causes the said plaintiff is entitled to recover but one penalty, not to exceed five hundred dollars, which it is ready and willing to pay, and it pleads the said separate suits in bar to the recovery of more than five hundred dollars for all of the same."

The district attorney's motions for separate judgments on the admission in the several pleas were overruled. The court sustained the company's motion to consolidate the causes, entered judgment for a single penalty, and ordered "that the within order in case 1866 shall apply to, operate upon and be conclusive of all the rights of the plaintiff in each of the several causes, to wit, 1867-1874, 1880 and 1884." The Government sued out a writ of error in case 1866 and, apparently out of abundant caution, another in 1867, later entering

into a stipulation in the Circuit Court of Appeals that the result in these two cases should control all the others.

The Circuit Court of Appeals for the Sixth Circuit (159 Fed. Rep. 33,) held that the order of consolidation was proper, but reversed the judgment on the ground that the United States were entitled to recover eleven penalties or one for each of the eleven shipments.

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the Court.

The consolidated record of the eleven cases shows that several hundred cattle and hogs of eleven different owners, shipped in 21 cars, loaded at different stations at various hours on February 2, 1907, were in one train at the time of the expiration of the successive periods for the unloading required by the act of 1906, "to prevent cruelty to animals in transit." The question is as to the number of penalties for which, in such a case, the carrier is liable.

Under the nearly identical act of 1873, Rev. Stat. 4386, it was held that the penalties were not to be measured by the number of cattle in the shipment, nor the number of cars in which they were transported. *United States v. Boston & Albany R. R. Co.*, 15 Fed. Rep. 209; *United States v. St. Louis R. R. Co.*, 107 Fed. Rep. 807. And the company contends that as the cattle here were in one train the failure to unload was one offense, punishable by one penalty. In support of its position it relies, among others, on authorities which hold that in larceny, if the goods stolen at one time belong to several persons the offense is single; and that, on conviction for working on Sunday, there is only one breach of the statute, the penalty for which cannot be multiplied by the number of items of work done on the day of rest.

But this does not mean, that if the thief should, at a different time, steal property from the same place, he could not be punished for the new transaction, nor that because a man had been convicted for working on one Sunday he could not be convicted and punished for subsequently working on a different Sunday. For every penal statute must have relation to time and place, and corporations whose operations are conducted over a large territory, by many agents, may commit offenses at the same time in different places, or at the same place at different times.

Here the 21 cars, loaded at different periods, had been gathered into one train. As the period of lawful confinement of the cattle first loaded expired, there was a failure to unload. For that failure the statute imposed a penalty. But there was then no offense whatever as to the animals in the other 20 cars of the same train, which, up to that time, had not been confined for 28 hours.

When, however, later in the day, at the same or a different place, the time for the lawful confinement of the animals in the other 20

cars successively expired, there were similar, but distinct and separate failures then and there to unload. They were separately punishable, since the provision that "for every such failure" the company shall be liable to a penalty prevented a merger. If the period of lawful confinement of several carloads of cattle expires at the same time and place, and the company fails to unload them as required by the statute, and if these cattle all belong to one owner, it is conceded that there is only one offense. It is not different if the same cattle, at the same time and place, had belonged to various owners, or had been shipped under different consignments.

Several expressions in the statute, and particularly the provision that, in estimating the period of lawful confinement, "the time consumed in loading and unloading shall not be considered," recognize that the proper loading or unloading of a number of animals may be treated as a single act, and there is nothing to indicate that it is to be treated as more than one act because the animals happen to belong to different persons. The loading of numerous cars might proceed concurrently; or if not discontinuous or unduly prolonged several cars of cattle of the same consignor might be loaded at the same time within the meaning of the act, in which event the period of their lawful confinement, on the same train, would end at the same time and place. There would in this latter case be coincidence between the one shipment and the one offense.

But in determining whether the number of penalties is always to be measured by the number of shipments on the same train, even when the animals were loaded at different times, it is to be remembered that the statute is general. It applies to the transportation of a trainload of cattle belonging to one owner; to the more usual case where animals belonging to one or more owners are loaded into different cars at different times, and also to those instances where one or a few horses or other animals are shipped and at a different time or farther on during the journey other animals are loaded into the same car. These differences in shipments do not affect the duty of the carrier to the animals, but only the time when the duty to unload is to be performed. The number of consignors, the consent of the owner or agent in charge of the particular shipment that the cattle might be confined for 36 hours, the number of bills of lading and the particulars of the shipment are immaterial, except as they serve to fix the limit of lawful confinement.

To illustrate: It appears in this record that several hundred animals belonging to one owner and consigned to one dealer were loaded into four cars at the same time. The 28 hours of their lawful confinement necessarily expired at the same time. The simultaneous failure to unload these four cars was single, and punishable as a single offense. But the duty and offense in this transaction would not have

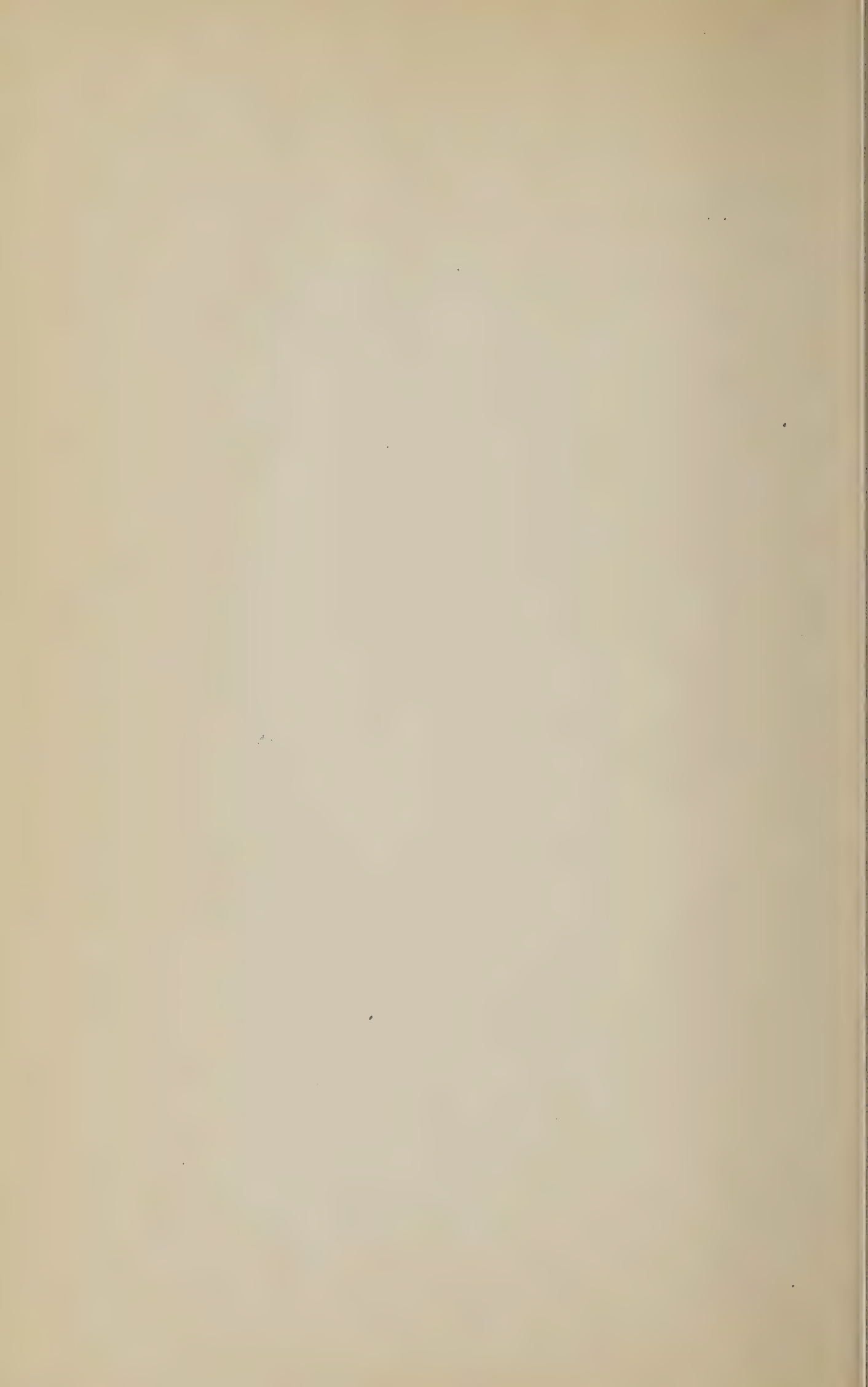
been quadrupled if the company had issued to the owner four bills of lading instead of one. Nor would there have been any increase of duty if these same cattle had been received from four consignors instead of one.

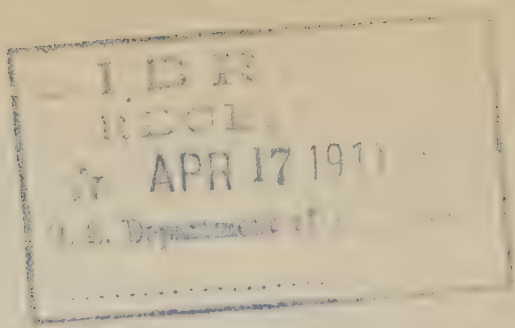
The statute was not primarily intended for the benefit of the owners. Indeed, it is restrictive of their rights. The penalty does not go to the consignor, but to the United States for each failure to unload cattle, regardless of who may own them; and even if the owner consented to their confinement beyond a period of 36 hours. The title of the act is "to prevent cruelty to animals in transit," its declared "intent being to prohibit their continuous confinement beyond a period of 28 hours, except upon the contingencies hereinbefore stated." Regardless of the number of shipments, at any time and place where they are willfully and knowingly confined beyond the lawful period there is a violation of the statute as to the animal or animals then and there in custody for transit in interstate commerce.

The point is made in the brief that this court has no jurisdiction, because the amount involved in the cases embraced in these writs of error was only \$1,000. The court, we think properly, consolidated all the cases, (Rev. Stat., Sec. 921) and, as consolidated, the amount of the possible penalties sued for in the eleven actions was fifty-five hundred dollars. The company is liable for nine penalties, because nine times it failed to unload as required by the statute. One penalty should be imposed as to animals referred to in cases numbered 1871 and 1872, and one as to those in 1869 and 1873, where the time for the required unloading respectively coincided. In other respects the judgment of the Circuit Court of Appeals reversing the judgment of the District Court is affirmed.

[Cir. 46]







Issued April 14, 1911.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 47.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Circuit Court of Appeals for the Sixth Circuit overruling claimants' demurrer to libel for condemnation and forfeiture under section 10 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768).

SYLLABUS.¹

Executive seizures are not necessary to confer jurisdiction over proceedings for confiscations under the Food and Drugs Act. Seizures under the statute are properly made by warrant issued after the filing of the libel.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

UNITED STATES OF AMERICA,	}	Error to the District Court of the United States for the Southern District of Ohio.
<i>Plaintiff in error,</i>		
<i>vs.</i>		
GEORGE SPRAUL & COMPANY, CLAIMANTS OF		
275 cases, more or less, of tomato catsup,		
<i>Defendants in error.</i>		

SUBMITTED JANUARY 4, 1911. DECIDED MARCH 7, 1911.

Before KNAPPEN, Circuit Judge, and COCHRAN and SATER, District Judges.

KNAPPEN, Circuit Judge, delivered the opinion of the Court.

The United States filed this libel in the United States District Court for the Southern District of Ohio under the Food and Drugs Act of June 30, 1906 (34 Stats., 768), for the seizure and condemnation of the articles named in the above title.

¹ Not by the court.

Section 10 of the act referred to provides "that any article of food, drug or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one state, territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia, or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the District where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury on any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States." The section in question contains provisions for the destruction or sale of the articles if condemned, as adulterated or misbranded, as well as for the return of the same to the owner thereof upon the payment of the costs of the proceedings, and the giving of a bond that the articles shall not be sold or disposed of contrary to the provisions of the act, or the laws of any state, territory, district or insular possession.

The libel in question, referring to the articles of food as "contained in original unbroken packages", alleges that the said packages were transported in interstate commerce, that the same were illegally held within the jurisdiction of the court, and that the articles of food contained therein are adulterated in violation of the act referred to "and liable to seizure and condemnation as provided therein, for the reason that each and every bottle and jug in said two hundred and seventy-five, more or less, cases, contains an article of food and food product consisting wholly or in part of a filthy, decomposed and putrid vegetable substance and is unfit for food." It prayed "the process of attachment in due form of Law, according to the course of this Court in cases of admiralty and maritime jurisdiction, so far as is applicable to this case."

An attachment was issued to the marshal, commanding the seizure of the property, and notice to claimants. The marshal returned that he had seized the articles mentioned and held the same in his custody subject to the further order of the Court. The claimants named in the title appeared and demurred "for the reason that it does not appear from an inspection of said libel that the catsup described therein had, prior to the filing of said libel and the issuance and service of process in this case, been seized in any way by any officer of the United States." The libel contains no allegation of previous

seizure. The court made an order sustaining the demurrer and dismissing the libel. The United States excepted to this order, and brings this writ of error to review the same.

The sole question presented here is whether previous executive seizure of the goods is necessary to give the court jurisdiction of the libel, as was held by the District Judge in an able and elaborate opinion.

In the case of *The Brig Ann*, 9 Cranch, 289, which was a case of an information against certain merchandise alleged to have been imported contrary to the non-importation act of March 1, 1809, it was held that the Court had no jurisdiction over the condemnation proceedings until after executive seizure. The statute which was involved in that case expressly provided for seizure by the collector and declared a forfeiture of the offending articles. 2 Stat. at L. 528. Mr. Justice Story based the necessity of previous executive seizure upon the judiciary act of September 24, 1789 (c. 20, sec. 9), which conferred upon the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." The learned justice interpreted this section of the judiciary act as conferring jurisdiction over the condemnation proceedings upon the district courts only of the district in which the seizure was made, saying that "before judicial cognizance can attach upon a forfeiture in rem, under the statute, there must be a seizure; for until seizure, it is impossible to ascertain what is the competent forum." In a large number of cases since the decision in the case of *The Brig Ann* it has been held that in proceedings in rem for forfeiture and confiscation previous executive seizure is necessary to jurisdiction, although there are cases not in harmony with this view. Among the cases in which such previous executive seizure has been held necessary to jurisdiction are the following: *Gelston v. Hoyt*, 3 Wheat. 245; *The Silver Spring*, Fed. Cas. No. 12,858; *The Washington*, Fed. Cas. No. 17222; *The Fideliter*, Fed. Cas. No. 4,755; *The Tug May*, 6 Bissell, 243; *The Idaho*, 29 Fed. 187, 191; *The Josefa Segunda*, 10 Wheat. 312; *Dobbin's Distillery v. United States*, 96 U. S. 395; *United States v. Larkin* (C. C. A. 6) 153 Fed. 113. The rule has also been extended to proceedings under laws providing for seizure and confiscation of "the property of rebels". *Pelham v. Rose*, 76 U. S., 103; *The Confiscation Cases*, 87 U. S. 92; *United States v. Winchester*, 99 U. S. 372. In all or nearly all of the cases above cited there is found either express statutory authority for the seizure, or express statutory declaration that the property shall be, or becomes, forfeited to the United

States by reason of the acts complained of, and in some cases both such statutory authority and statutory declaration are found. The Statute involved in the case of *The Silver Spring* expressly provided for a forfeiture of the boat "if found within the district", although not for an executive seizure; 3 Stat. at L. c. 35, Sec. 6. In the statute involved in *Gelston v. Hoyt* express provision was made for seizure by the revenue officer whenever it should appear that a breach of the laws of the United States had been committed whereby the ship or the goods on board might become liable to forfeiture. The act relating to navigation of steam vessels (Rev. Stat. Sec. 4499), as construed by District Judge Deady in the case of *The Idaho*, expressly authorizes a seizure by the proper officer of the government in advance of judicial proceeding. The *Josefa Segunda* involved a statute providing that the property subject to confiscation was liable to be "seized, prosecuted and condemned, in the district where the said ship or vessel may be found or seized." *Dobbin's Distillery v. United States* arose under an internal revenue act which expressly provided for forfeiture. 15 Stat. c. 186. The Statute involved in *United States v. Larkin* arose under Revised Statutes, section 3072, which makes it "the duty of the several officers of the customs to seize and secure any vessel or merchandise which shall become liable to seizure by virtue of any law respecting the revenue." In the act for the seizing and confiscating of property of rebels express provision is made for executive seizure. (See *Pelham v. Rose*, *The Confiscation Cases*, and *United States v. Winchester*.)

The present judiciary act (Rev. Stat. Sec. 563, sub-div. 8) gives the district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction * * * and of all seizures on land and on waters not within admiralty and maritime jurisdiction", the subdivision mentioned thus omitting the provision found in the section of the judiciary act of 1789 to which we have referred, as to seizures "within their respective districts", and including cases of "seizures on land and on waters not within admiralty and maritime jurisdiction." In cases of seizures on land, however, the district court proceeds not as a court of admiralty, but as a court of common law upon a trial by jury. *The Sarah*, 8 Wheat. 390; *United States v. Winchester*, 99 U. S. supra. In *Dobbin's Distillery v. United States*, Mr. Justice Clifford said: "Judicial proceedings in rem, to enforce a forfeiture, cannot in general be properly instituted until the property inculpatated is previously seized by executive authority, as it is the preliminary seizure of the property that brings the same within the reach of such legal process. *The Schooner Anne*, 9 Cranch, 289." In the *Dobbin's* case due executive seizure had in fact been made for breach of the internal revenue laws and the above statement was clearly obiter.

Assuming for the purposes of this opinion that, in navigation, customs and revenue cases, the right of executive seizure for violation of the statute exists, even without express statutory provision therefor, and that in such cases such seizure must precede judicial action for condemnation, the real and decisive question before us is simply what was the intention of Congress in this regard as expressed in the food and drugs act. It is noticeable that the act nowhere declares the goods ipso facto forfeited by an infraction of the act. On the contrary, express provision is made for the redelivery of the goods to the owner by order of the Court, upon the payment of the costs and the giving of bond, even in cases where they are found to offend against the act. The act provides that the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor, "shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale * * * or which may be submitted for examination by the chief health, food or drug officers of any state, territory, or the District of Columbia * * *"; that the examination of such specimens shall be made in, or under the direction and supervision of, the Bureau of Chemistry of the Department of Agriculture, for the purpose of determining whether such articles are adulterated or misbranded; and in case such adulteration or misbranding appears, for the giving of notice by the Secretary of Agriculture "to the party from whom such sample was obtained", with opportunity to be heard. The act nowhere provides for executive seizure of property offending against the act. On the contrary, the only duty enjoined upon the Secretary of Agriculture (and upon him only), in case it shall appear to him that any of the provisions of the act have been violated, is to "at once certify the facts to the proper United States District Attorney." (Sec. 4). Not only is the District Attorney given no power of seizure, but section 5 of the act expressly makes it his duty, on receiving from the Secretary of Agriculture (or certain other officers) report of a violation of the act, "to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided", thus suggesting by implication the exclusion of right of executive seizure. Nor has the marshal implied power to make executive seizures under the act. He is not by statute charged with the enforcement of the act, as are revenue and customs officers with respect to laws relating to those subjects.

We are not concerned with the question whether the proceedings and notice provided by Sections 3, 4, and 5 of the act are necessary prerequisites to action by the district attorney, nor whether they

apply to a proceeding under section 10 of the act. (See *United States v. 50 Barrels of Whiskey*, 165 Fed. 966; *United States v. 65 Casks of Liquid Extracts*, 170 Fed. 449.) We call attention to these provisions because they are the only ones expressly relating to proceedings for the enforcement of the penalties provided by the act, as distinguished from criminal prosecutions. The considerations to which we have adverted seem to us to repel rather than sustain, an inference that an executive seizure is necessary, or even contemplated, previous to judicial proceedings in condemnation. In the case of a law of this character while it would not be unnatural to provide for an executive seizure, and while such power of seizure would seem of advantage in the enforcement of the act, on the other hand, if authority to make such seizure was intended, it would be the natural course to expressly so declare. There is no express declaration to that effect, and none by implication, unless contained in the clause of section 10 providing that the offending articles "shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation", or in the provision that "The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty * * *". It is clear that, as the former clause is punctuated, there is no necessary implication of previous executive seizure. According to the punctuation, the seizure for confiscation would seem to be "by a process of libel"; and although such punctuation is by no means conclusive, and should not be controlling as against the intent of the act as otherwise shown, it is entitled to consideration.

It is urged that the clause "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty" refers to the practice under Admiralty Rule 22, which provides that "the information and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure * * * and the district within which the property is brought and where it then is". But while this rule recognizes the practice of informations and libels upon seizures, it is not declaratory of the necessity of such previous executive seizure. There is, in our opinion, nothing in the reference to "proceedings in admiralty" contained in section 10 of the food and drugs act which adopts rule 22 rather than rule 23, which latter rule applies to "all libels in instance cases, civil or maritime," and which provides that the libel shall state "if the libel be in rem, that the property is within the district." Under rule 23, jurisdiction is obtained by the presence of the property within the district (*Henry on Admiralty*, sec. 127, 132; *The Rio Grande*, 23 Wall. 458), and the Court acquires its jurisdiction over the libel by its filing, and

over the res by seizure of the same under a process issued after the libel is filed. *The Queen of the Pacific*, 61 Fed. 213; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* (C. C. C. A. 9) 94 Fed. 180.

The proceeding before us was not in admiralty. The food and drugs act merely provides for conformity of all proceedings for confiscation thereunder "as near as may be, to the proceedings in admiralty". Previous executive seizure is no part of admiralty proceedings. The language in question, to our minds, falls far short of declaring by necessary implication that a condition precedent to jurisdiction in case of forfeitures under the laws relating to impost, navigation or trade, viz: an executive seizure, is necessary to jurisdiction over judicial proceedings in confiscation under the food and drugs act. Nor is there anything in the language of the present judiciary act which limits jurisdiction over condemnation proceedings in rem to the district where the property has been previously seized.

Taking into account the nature of the act, and the various considerations to which we have referred, as well as the embarrassment which might well result from an executive seizure whose validity must depend not only upon the determination by the Court of the question of fact of misbranding or adulteration, but also upon the existence of the other facts necessary to bring the articles under the federal statutes, we are of opinion that the act should not be construed as making a previous executive seizure necessary to the jurisdiction of the court over proceedings for confiscation. We are the better content with this conclusion from the fact that it has been the general, if not the universal practice, under this act, for seizures to be made on warrant issued after the filing of the libel.

In our opinion the order sustaining the demurrer should be reversed.

[Cir. 47]



Issued May 3, 1911.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 48.

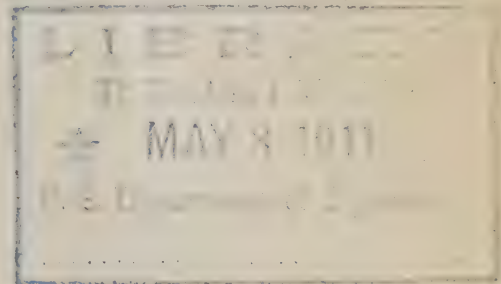
GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the United States Circuit Court for the Western District of New York, involving violation of the Twenty-eight Hour Law (Act of June 29, 1906; 34 Stat., 607).

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,
against
THE NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY.



John Lord O'Brian, United States Attorney.

Hoyt & Spratt (Alfred L. Becker, of counsel), for defendant.

HOLT, J.:

This action is brought to recover a penalty under the act of June 29, 1906, to prevent cruelty to animals while in transit by railroad, commonly called the 28-Hour Law. That act provides that no railroad transporting cattle from one state to another shall confine them in cars more than 28 consecutive hours, which in certain cases may be extended to 36 hours, without unloading them for rest, water and feeding. The act also provides that "when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply." On March 7, 1910, seventeen carloads of cattle were shipped from Chicago to New York City. The time of confinement had been duly extended to 36 hours. They were delivered to the defendant at Suspension Bridge. At that time they had been confined thirty-two hours and fifteen minutes. The defendant then transported the cattle to Newberry Junction, Pennsylvania, where they were delivered eighteen hours later, after a continuous confinement of fifty hours and twenty minutes. The cattle were delivered at Newberry Junction to the

Philadelphia & Reading Railroad to be transported to New York. It was, in substance, a shipment from Chicago to New York, a total run of about sixty-five hours. These cattle were all carried in what are called patent cattle cars, which purport to afford proper food, water, space, and opportunity to rest to the cattle without their being unloaded. All of these cars were arranged with hayracks, and with a space at the top of the car in which hay could be placed, from which it was to fall down into the rack. Some of the cars had and some had not arrangements for watering the cattle in the car. The cars which had such arrangements were furnished with four sets of pans, with four pans to each set, each set fastened on a pipe, on which they turned as on a pivot. There was a door in the center of each car, on each side, and one of the four sets of pipes and pans ran from each end of the car to the center door on each side. When not in use, the pans could be turned up against the side of the car. When required to be used for watering the cattle, they were turned down in a horizontal position, and water was introduced by a hose into one of these pans, which was connected by the pipe with the other pans, so that the water from the hose ran through the pipe into all the pans. When these pans were turned down for the cattle to drink, there was no appliance for holding them secure in a horizontal position, and it was a common thing for them to be tipped over by the cattle, and the water spilled out. Frequently the men in charge, when watering the cattle, used various appliances to secure them in position. The only place between Chicago and Newberry Junction in which any hay or water was supplied to the cattle was Suspension Bridge. At Suspension Bridge the cattle in the cars in which there was no provision for supplying water in the car were unloaded and given water, and then reloaded. In the other cars the cattle were not unloaded. Four of the cars contained bulls, each tied the first one to one side of the car and the next to the other side, in alternation. The train arrived at Suspension Bridge about mid-night. There was a platform in front of the stockyards there, a little longer than eight cars. It was usual to take down from each cattle train eight cars, and unload those to be unloaded, and supply feed and water to the patent cars. There were hydrants and hose there with which to furnish water. The hose used for supplying water to the cars was rather short, although there was an extra length of hose which was frequently used there in order to convey the water to the further side of the cars. The evidence satisfies me that on the night in question no water was introduced at Suspension Bridge into the troughs on the further side of the four cars containing the bulls, and that in two other cars the cattle tipped up the pans, and the water spilled out, and no more was provided, so that they practically got no water there. I think that this particular type

of cars ought to be provided with some apparatus which would securely fasten the pans, when placed in a horizontal position to receive water, so that they could not be tipped over until the fastenings were removed.

The Government claims that a number of these cars contained no hay on their arrival at Suspension Bridge and that no hay was put in the cars there. This is positively testified to by Mr. O'Leary, the Government inspector, who was there on the night in question. Kinney, the manager at the Suspension Bridge Stockyards, and McQuillan, his assistant, testified that they had no special recollection of what took place on the night in question, but that it was their uniform practice to put hay in all the cars that needed it, and O'Leary admits that they did put hay in one of the cars on the train. Kinney and McQuillan both impressed me as honest witnesses and as careful, prudent men. It is for the interest of the shippers to have their cattle properly fed on these trips, as the cattle always shrink in weight to some extent on long journeys, and their weight as beef is worth more than the weight of the hay. It is also to the interest of the railroad to furnish hay because whatever hay is furnished is sold and charged to the shippers at a profit. I think, if Kinney furnished hay to one car, he probably would have furnished it to the other cars if he had thought they needed it. Kinney may possibly have seen that there was sufficient hay remaining in the other cars, which O'Leary may not have seen. Upon the whole evidence, I think there is sufficient doubt in the case whether there was any neglect to furnish the necessary amount of hay at Suspension Bridge to prevent the recovery of a penalty on that ground.

It is also claimed that in this shipment cattle were packed so tightly in some of these cars that they did not have proper space and opportunity to rest. In one of the cars, 36 feet long, 21 bulls were tied side by side, and in a number of them eighteen and nineteen large cattle were carried. I do not think that they had sufficient space to lie down, certainly not without danger of being injured by being trampled on by the others. It is probably true that they would not all want to lie down at one time, but to compel cattle to stand for sixty-five hours continuously under such wearisome conditions as must attend a transportation by rail for such a period of time is clearly a serious form of cruelty. The evidence is uncontradicted that cattle under transportation ought to have at least $2\frac{1}{2}$ feet of space for each animal. That is the space required by the United States statute relating to shipment of cattle at sea, and obviously it seems a small enough space to be occupied by cattle anywhere. I think that the charge that the cattle transported in some of these cars did not have proper space and opportunity to rest is established.

The transportation of cattle on railroads for long distances at the best involves a good deal of hardship and suffering. The provisions of the act for their protection are conservative enough, and should be strictly enforced, particularly in the matter of furnishing them water. The evidence shows that many cattle, while being transported on a railroad, will not eat much, but they become excited and feverish, and want a good deal of water. To transport cattle from Chicago to New York without giving them any water on the way is serious cruelty.

My conclusion is that the Government should have judgment in this case for the penalty demanded of \$500, with costs.

APRIL 6, 1911.

Cir. 48]

O

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 49.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Circuit Court of the United States for the Southern District of New York Overruling Defendant's Demurrer in a Prosecution Arising under Section 2 of the Food and Drugs Act of June 30, 1906 (34 Stat., 768).

SYLLABUS.¹

1. The word "investigation," used in section 7 of the Food and Drugs Act, is not necessarily identical in meaning with the word examination used elsewhere in the act, and section 7, which declares a drug to be adulterated if it "differs from the standard of strength, quality, or purity as determined by the test laid down in the United States Pharmacopœia * * * official at the time of the investigation" is not ex post facto legislation. The amenability of shippers to prosecution under section 2 depends on the fact existing at the time when shipment takes place, and no offense is committed in shipping a drug conforming at the time of shipment to standards then in force, even though subsequently a drug may be found on examination not to conform to other tests which at the time of the examination have become operative as to further shipments of the drug.

2. Congress, in providing that a product shall be deemed to be adulterated if it fails to comply with the test laid down in the Pharmacopœia or National Formulary official at the time of investigation, did not delegate legislative power, but merely prescribed the method of ascertaining facts upon which the operation of the statute was to depend.

3. The words "false" and "misleading," as used in section 8 of the act, are of the same import, and either or both may be used indifferently in an information charging the misbranding under the act.

CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES }
vs. }
LEHN & FINK. }

On demurrer to the third and fourth counts of an information under the Food and Drugs Act of June 30, 1906.

MEMORANDUM.

The demurrer admits that defendants shipped from one State to another an article called jalap. The third count alleges that this

¹ Not by the court.

jalap (being a drug) was "adulterated, in that it was sold under and by a name recognized in the United States Pharmacopœia or National Formulary, and it differs from the standard of strength, quality and purity as determined by the test laid down in (said Pharmacopœia) *official at the time of investigation.*"

The fourth count alleges that the same jalap "was misbranded in that (the) label (upon its container) would indicate that said product contains 12.81% resin soluble in ether, whereas in truth and in fact said drug contains .82% resin soluble in ether and only 5.21 total resin.

Three questions of law are raised by the demurrers:

1st. That so much of the act as is necessary to support the counts mentioned is unconstitutional as being *ex post facto*.

2d. That the same portion of the act is unconstitutional as containing an improper delegation of legislative authority.

3d. That the fourth count is defective in that it does not state that said alleged misbranding was false *and* misleading, which is said to be the proper reading of the words "false *or* misleading" in Section 8 of the Act.

The argument which seeks to condemn (partially at all events) the Act as *ex post facto* legislation is this: the information is for shipping an adulterated drug, and Section 7 of the statute declares that for the purpose of the act a drug is deemed adulterated when "sold under or by a name recognized in the United States Pharmacopœia (and differing) from the standard of strength, quality or purity as determined by the test laid down in (said) Pharmacopœia * * * *official at the time of investigation.*"

The book called a Pharmacopœia changes from time to time; its tests may be one thing to-day and another a month hence. Therefore a man may ship a drug which answers the statutory test at the time of shipment, and yet a month or so later when an investigation into the matter is had, it may be found that owing to a change in the book, the same unchanged drug has become adulterated; thus converting a shipment innocent when made, into a criminal offence.

If this be the proper statutory construction, such legislation is plainly *ex post facto* as subjecting the citizen to punishment for something which when accomplished was obnoxious to no statute.

Admittedly it is the duty of this Court to uphold the constitutionality of any congressional provision if it can possibly be done with reason; even if it be not the duty of all trial courts to leave such constitutional questions to the higher tribunals,—as has so often been said. In this instance defendant's argument rests upon the assumption that that which constitutes the crime is the state of facts found when an investigation is had, and upon the further assumption that

the "investigation" mentioned in Sec. 7 of the act is identical with the "examination" referred to in Sections 3, 4 and 11 of the same statute.

It seems to me that neither of these assumptions is necessary, and if they are not necessary then the act is not open to the objection of being *ex post facto*.

If by "time of investigation" (under Sec. 7) be meant the time of "examination" made by the Department of Agriculture (under Sec. 4), it does not follow that the crime is *then committed*. It may be that months after shipment, a drug is to be deemed adulterated under the conjoint effect of Sec. 7 of the act, plus a recent amendment to the Pharmacopœia;—but it is not true that the act declares the mere existence of such adulteration to be an offence. The offence is stated and completely defined (so far as this case is concerned) in Sec. 2 of the act and (applying the statute to the facts here) it is there said that "any person who shall ship * * * from any State * * * to any other State * * * any * * * drugs * * * adulterated or misbranded within the meaning of this act" shall be guilty of a misdemeanor. The offender is guilty by the act of shipment, for the whole statute depends for validity upon the commerce clause of the Constitution. If he is not guilty when the shipment takes place and by reason of the shipment he is not guilty at all. If the statute be construed to convert a shipment lawful when made into an illegality after the shipment is accomplished, it is not only *ex post facto* but without any warrant as a regulation of commerce. It may well be, therefore, that when any given drug is found to be adulterated within the meaning of Sec. 7 by reason of a recent change in the Pharmacopœia, that it "shall be deemed to be adulterated", but it can only be deemed to be adulterated either by common sense or by the very language of the act in the future tense. Any further shipment of that drug may instantly subject shipper and receiver to the penalties of the act, but the provision in question cannot apply to an already accomplished shipment made at a time when the drug did comply with the Pharmacopœia for the time being.

Also it is not necessary to identify the word "investigation" in Sec. 7 with the word "examination" in other sections. Investigation is much the wider word; it includes not only an examination into the nature of the article shipped, but into all the circumstances of shipment. The examination of the drug itself is but a part of the investigation which must necessarily be held, to ascertain the matters necessary to the formulation and proof of an information or indictment.

It is therefore held that the act is not open to the objection of being *ex post facto*, and it follows from such holding that no conviction can be had thereunder, unless it is shown by competent evidence that

(in this instance) the drug when shipped was adulterated within the meaning of the act.

The contention that the act is void as an unconstitutional delegation of legislative authority rests upon a somewhat different basis. It is pointed out, and truly, that the act contemplates changes from time to time in the Pharmacopœia, and declares as of the date of its passage in 1906 that (for example) that may be a crime in 1916 which was not a crime when the statute became law, because of an intervening change in the "test laid down in the United States Pharmacopœia."

On this point the decision in *Ohio vs Emery*, 55 Oh. St., 364, is interesting and instructive. There the Legislature of that State had passed a Pure Food and Drug Act which almost in the language of the national statute defined adulteration as a departure from standard of the United States Pharmacopœia. But it did not provide for any future changes in the Pharmacopœia itself. Quite naturally the Court in the case cited held that reference must be had solely to the book in existence at the time of the passage of the statute; so that the question here is whether Congress can do that which the Legislature of Ohio omitted to do.

From the multitude of decisions on the subject of delegation of legislative authority it seems to me necessary to make very few citations:

"The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power and must therefore be a subject of inquiry and determination outside of the halls of legislation." *Locke's Appeal*, 72 Pa. at 498, cited with approval in *Union Bridge Co. vs. United States*, 204 U. S., at 383.

The federal decision cited reviews the whole matter. That also was a case of criminal information, and in my judgment is controlling authority here. A comparison also of the much relied upon decision in *United States vs Eaton*, 144 U. S., 677, with *Matter of Kollock*, 165 U. S., 526, is instructive.

To me there could not be a plainer instance than this act of the Legislature's having made a complete and perfect criminal statute, not dependent at the time of its passage on the act of any other power or person and of them providing for changes in the meaning of the word "adulterated"; a word which in the nature of things may and should change its signification with advancing knowledge or increasing civilization.

It is just as true that the meaning of "adulterated" in 1906 may be unsuitable to 1916, as that the phrase "unreasonable obstruction to free navigation" should have had a meaning as applied to the Monongahela and Allegheny Rivers in 1874, different from that found proper in 1902. And it is just as reasonable and lawful for the Pure Food statute to operate on the meaning of the word "adulterated" as given from time to time by experts in chemistry and hygiene, as it was held to be for the meaning of "unreasonable obstruction to navigation" to depend for its signification upon the opinion of the Secretary of War for the time being when fortified by the opinions of the engineers of his department.

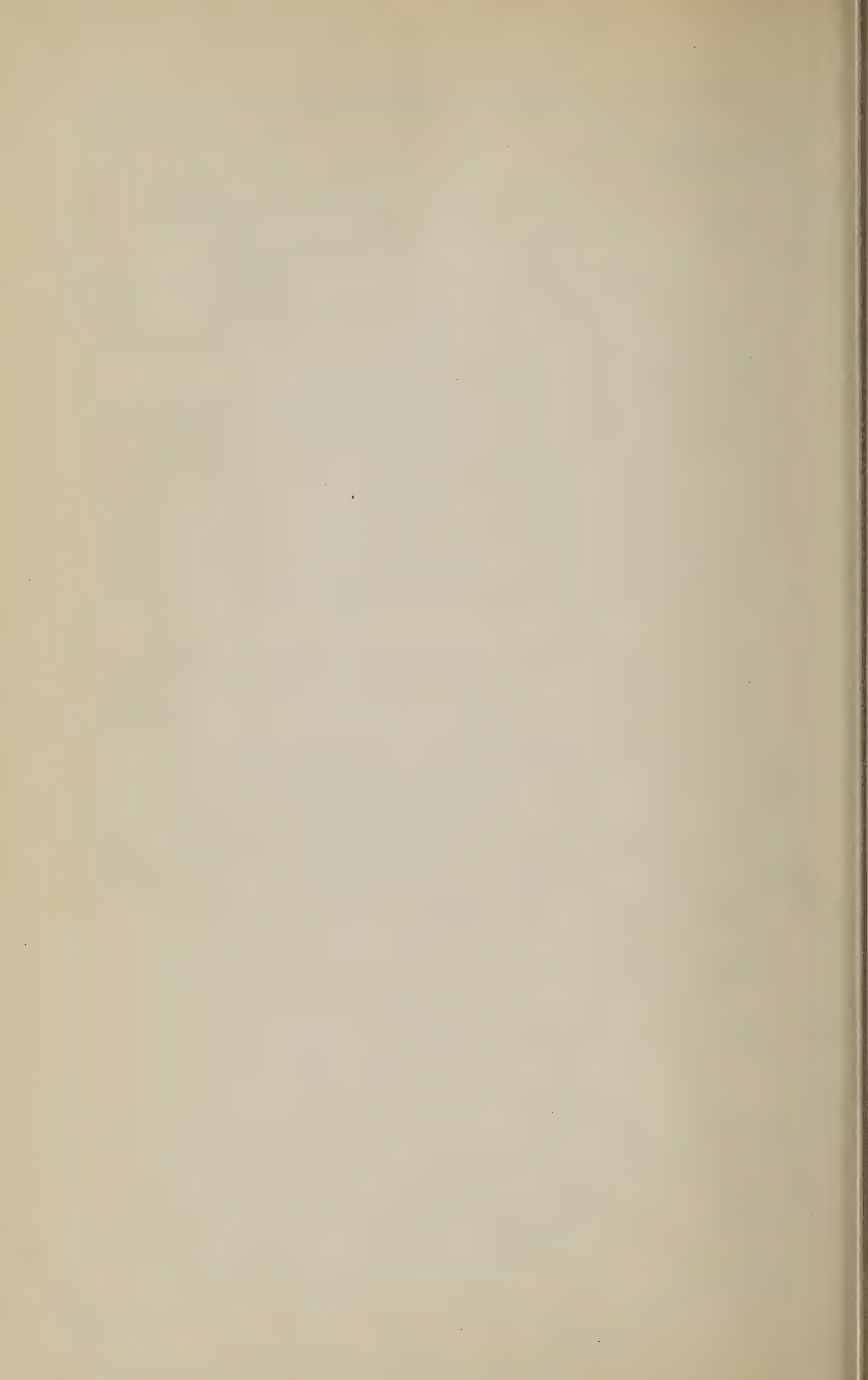
As to the third contention, I do not find either the word "false" or the word "misleading" used in the fourth count of the information, but am of the opinion that the two words as used in Sec. 8 of the Act are of the same import and one or the other or both may be indifferently used. The appropriate meaning of the word "false" as extracted from the dictionary is "adapted or intended to mislead," and the word "misleading" means "tending to lead astray, deceptive." I perceive no difference in these significations for the purpose of the statute in question.

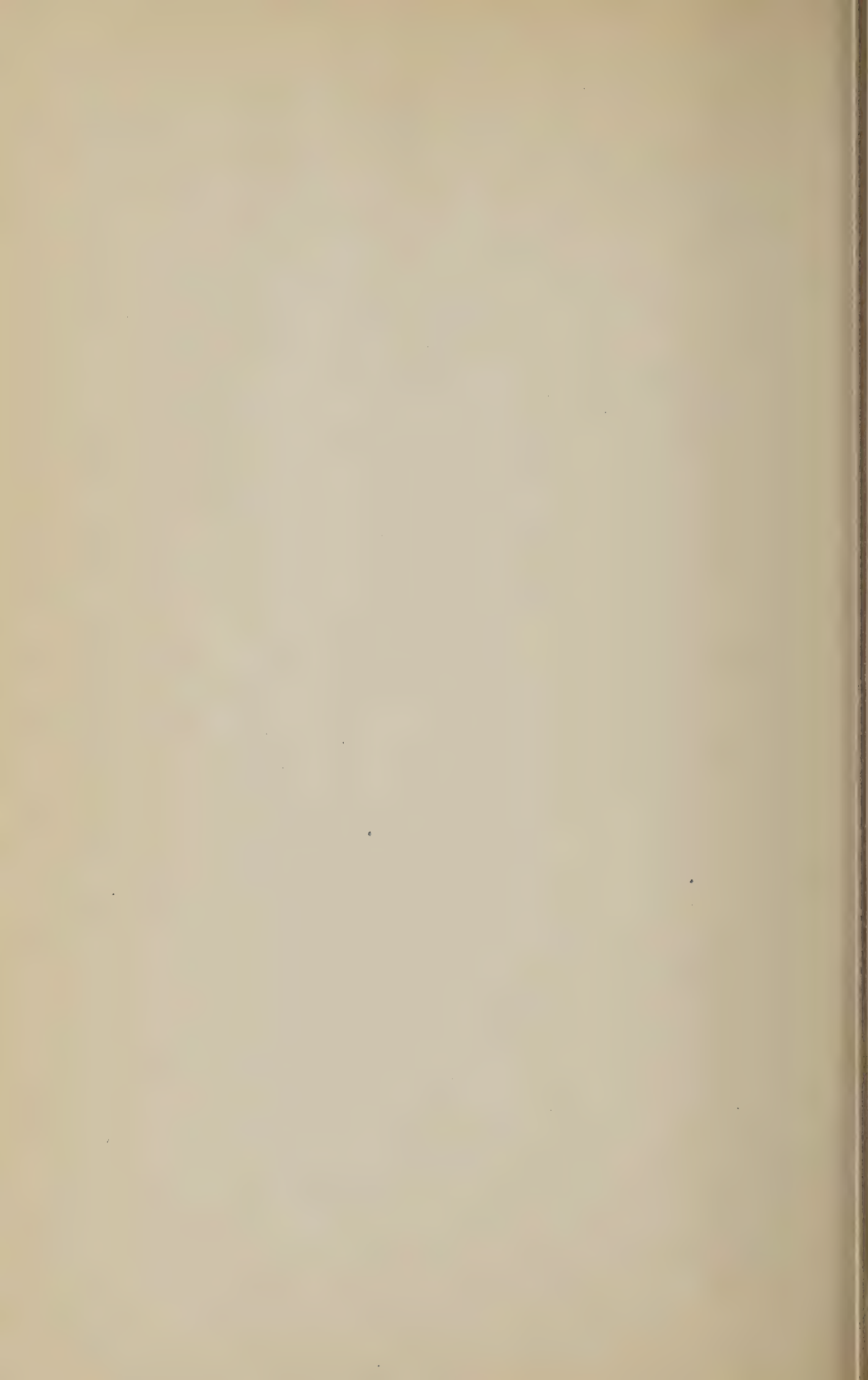
The demurrers are therefore overruled; but it may be added that it seems to me from a comparison of the counts with the Pharmacopœia, that the jalap label of which the Government here complains is a grotesque mistake, something flowing from a printer's error or the ignorance of an unskilled chemist. The proportion of resin soluble in ether stated in the label, is so enormous and impossible, as to deceive no one to whom the label would mean anything, and such puerile errors ought never to have been made the subject of criminal procedure. A charge based on this kind of mistake is well calculated to bring into disrepute those weapons of the law which ought to be reserved for intentional wrongdoers.

MARCH 17, 1911.

[Cir. 49]







L I
P - O
★ JUN 22 1911

U. S. Department of Agriculture

Issued June 22, 1911.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 50.

GEO. P. McCABE, Solicitor.

THE CATTLE QUARANTINE ACT.

Decision of the District Court of the United States for the District of South Carolina,
Overruling a Demurrer to an Indictment in a Case Involving an Alleged Violation of
the Act of March 3, 1905 (33 Stat., 1264).

SYLLABUS.¹

1. Where live stock are transported over several connecting lines of road, in interstate commerce, from a point in an area quarantined by the Secretary of Agriculture by authority of the act of Congress approved March 3, 1905 (33 Stat., 1264), to a point outside of that area, each carrier participating in such transportation is liable for failure to comply with the regulations of the said Secretary issued under that act.

2. *United States v. El Paso, etc., R. Co.*, 178 Fed., 846; and *United States v. C., B. & Q. R. R. Co.*, 181 Fed., 882, contra, not followed.

3. The purpose of the act of March 3, 1905, is to prevent the dissemination of contagious, infectious, or communicable diseases of live stock, by prohibiting the transportation of such stock from infected areas. This purpose would be defeated if each connecting carrier, in the course of interstate transportation of live stock from quarantined areas, were not bound to obey the regulations of the Secretary of Agriculture issued under authority of the act.

4. The act of March 3, 1905, is, in every sense, a remedial statute, and should be so construed as most effectually to accomplish the intention of the legislature in enacting it.

UNITED STATES OF AMERICA, DISTRICT OF SOUTH CAROLINA, IN
THE CIRCUIT COURT.

THE UNITED STATES	}	Indictment for violation of the act of March 3, 1905.
vs.		
THE SOUTHERN RAILWAY COMPANY.		

BRAWLEY, *District Judge*:

The question raised by this demurrer is important to all engaged in the raising of cattle, and as the conclusion reached by the court differs from that in the only two cases which have been reported, it is well to state the reasons for that conclusion.

¹ Not by the court.

The question raised is stated in the demurrer as follows: "The act of March 3, 1905, which makes it unlawful for any railroad company to receive for transportation or transport from any quarantined State or Territory, or from the quarantined portion of any such State or Territory, into any other State or Territory, any cattle or other live stock, except as therein provided, applies only to the initial carrier which transports the stock from the quarantined district, and the connecting carrier which receives the stock in any State or Territory for further transportation is not subject to punishment thereunder."

This position is sustained in *U. S. vs. El Paso, etc., R. Co.*, 178 F. R. 846, in a case arising in the Western District of Texas, and *U. S. vs. Chicago, B. and Q. R. R. Co.*, 181 F. R. 882, arising in the Western District of Missouri. The indictment sets forth the establishment of a quarantine and the making and promulgation by the Secretary of Agriculture of certain rules and regulations in connection therewith, governing the interstate movement of cattle, giving notice thereof to the proper officers of the Southern Railway Company, and of the Nashville, Chattanooga and St. Louis Railway Co., and due publication of notice, as required by the act. These rules and regulations were promulgated March 27, 1909, and became effective on and after April 1, 1909, and are contained in what is designated as the Bureau of Animal Industry, Order No. 158. These rules and regulations would be judicially noticed by the court, *Caha v. U. S.*, 152 U. S., 212, but the indictment sets them forth substantially. It appears from the indictment that the entire State of Alabama was quarantined; that the rules and regulations prohibited cattle from being moved from any part of Alabama into certain counties in South Carolina, and particularly the county of Greenville, in the State of South Carolina. It further alleges that the Southern Railway Company was engaged in the carriage and transportation of freight received by it from a certain connecting carrier, to wit, the Nashville, Chattanooga and St. Louis Railway Company, and alleges that the Southern Railway Company unlawfully moved and transported, under conditions other than those prescribed by the Secretary of Agriculture, from New Market, in the State of Alabama to Greenville, in the county of Greenville in the State of South Carolina, 40 head of cattle, the same being a shipment consigned and shipped by R. D. Cowley and Luna and Company, consignors, from New Market in the State of Alabama, to Pates, and Allen, consignees at Greenville, in the county of Greenville, in the State of South Carolina, which transportation was effected as follows: the Nashville, Chattanooga and St. Louis Railway Company received the said shipment of cattle at New Market, Alabama, and transported said cattle to Atlanta, Georgia, and there

delivered the cattle to its connecting carrier, to wit, the Southern Railway Company, which then transported it from Atlanta, Ga., to Greenville, S. C. and there delivered the cattle to the consignees. The allegation of the indictment is that the shipment of said cattle was a through shipment from New Market, Ala., to Greenville, S. C. The demurrer of the defendant is that the indictment only charges the defendant, The Southern Railway Company, with transporting the cattle from Atlanta, Ga., to Greenville, S. C. The pertinent sections of the act are as follows: "Sec. 2: That no railroad company * * * shall receive for transportation, or transport, from any quarantined State or Territory or the District of Columbia, or from any quarantined portion of any State * * * into any other State, any cattle or other live stock, except as hereinafter provided, nor shall any person, company or corporation, deliver for such transportation to another railroad company any * * * cattle or other live stock, except as hereinafter provided. * * * Sec. 3: That it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed, when the public safety will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, treatment, handling and manner of delivery and shipment of cattle or other live stock from a quarantined State or Territory or the District of Columbia, or from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia, and the Secretary of Agriculture shall give notice of such rules and regulations in the manner provided in sec. 2 of this act for the notice of establishment of quarantine. Sec. 4: That cattle and other live stock may be removed from a quarantined State * * * into any other State or Territory * * * under and in compliance with the rules and regulations of the Secretary of Agriculture * * * but it shall be unlawful to move or allow to be moved, any cattle or other live stock from any quarantined State * * * into any other State * * * in manner or method or under conditions other than those prescribed by the Secretary of Agriculture."

The object which the legislative body sought to attain, and the evil which it was endeavoring to remedy may always be considered for the purpose of ascertaining its intention. *United States vs. 99 Diamonds*, 139 F. R. 965; *Brown vs. Dushesne Co.*, 60 U. S., 183, 194; *Platt v. U. P. Railway Co.*, 99 U. S. 48, 59; *Durland vs. U. S.*, 161 U. S. 306, 313.

The purpose of the act of March 3, 1905, is to prevent the dissemination of contagious, infectious or communicable diseases of live stock, by prohibiting the interstate transportation from infected areas. By sec. 2 of the act, the receiving for transportation is made

an offense, and the actual transportation itself is made an offense. It is evident, therefore, that the Congress had in view that the act of transportation, as well as the act of receiving for transportation should be subject to such regulations as the Secretary of Agriculture should prescribe. If a connecting carrier which receives cattle under a continuous shipment is not subject to these regulations then the object that the Congress had in view may, as far as the connecting carrier is concerned, be defeated. In other words, the contention is that although the Secretary may make regulations concerning this continuous shipment, the connecting carrier is not bound to observe them. Such a construction would defeat the purpose of the act. The construction placed upon the act in the two cases cited and relied upon, that where the transportation is over several connecting roads, the railroad only whose tracks lie in the quarantined area, and which received the cattle therein, and transported them, interstate, out of that territory, is liable, is too narrow. This contention is based upon the interpretation of the phrase "from any quarantined States, etc.", which would restrict the offence to the original movement of the cattle from a quarantined area of a State to another State. The phrase "From any quarantined State" must be taken in connection with the succeeding words; "into any other State, etc.", and both must be construed in aid of the remedial purpose of the act. To constitute the offence of transportation under this act the transportation must not only be "from" a quarantined territory, but it must be "into" prohibited territory. The act of transportation is a continuous one, and where there is a through shipment, each successive carrier which takes up and transports the cattle towards its final destination in the prohibited territory, is engaged in transporting, and is therefore amenable to the act.

The argument of the defendant is that the Southern Railway Company is not liable because it did not transport the cattle from Alabama. If this argument is sound, then it might be contended that the Nashville, Chattanooga and St. Louis Railway Company would not be liable, for the reason that it did not transport the cattle into Greenville County, S. C., the prohibited territory, and the anomalous result would follow, that under a statute which expressly punishes the act of transporting cattle from a quarantined territory into prohibited territory, neither the initial nor the terminal carrier could be held liable. The true construction is that where cattle are consigned as a through shipment from a point in the quarantined area to a point in prohibited territory, each railroad which participates in the transportation of such shipment is liable under the act. Whether the Southern Railway Company, the connecting and delivering company, may defend itself upon the ground that it had no knowledge, or means of knowledge, that the car containing the cattle

was shipped from quarantined territory, is a question which may arise upon the trial. There can be no doubt that the Southern Railway in this transaction was engaged in interstate commerce. "Every part of every transportation of articles of commerce in a continuous passage, from an inception in one State to a prescribed destination in another, is a transaction of interstate commerce. Their transportation never ceases to be a transaction of interstate commerce from its inception in one State until the delivery of the goods at their prescribed destination in the other, and every one who participates in it, who carries the goods through any part of their continuous passage, unavoidably engages in interstate commerce." *United States vs. C. and N. R. Co.* 157 F. R. 321, 323; *The Daniel Ball*, 16 Wall. 557, *Rhodes vs. Iowa*, 170 U. S. 412, 418, 419, 426; *Kelly vs. Rhoades*, 188 U. S. 1; *Leisy vs. Hardin*, 135 U. S. 100.

Since the act of March 3, 1905, and the regulations set forth in the indictment prohibit cattle from being transported from Alabama into the county of Greenville, S. C., it practically amounts to a prohibition of any interstate traffic in cattle between those points, and as the Southern Railway was certainly engaged in this interstate traffic when they transported the cattle from Atlanta, Ga., to Greenville, S. C., it is difficult to see why it should not be held to have violated the act, and regulations made thereunder. If the contention of the defendant in this case is correct, then there are other rules and regulations of the Secretary of Agriculture concerning the interstate shipment of cattle from quarantined areas which could be violated with impunity by connecting or terminal carriers. No violation of the rules and regulations now referred to is alleged in this case, but they may be adverted to for the purpose of showing to what extent the construction of the act contended for by the defendant would tend to defeat the purpose of the act and to destroy the efficacy of the rules which the Secretary is authorized by the act to make and promulgate. The rules and regulations referred to permit the interstate shipment by rail from the quarantined area to recognized slaughtering centers of live stock intended for immediate slaughter, provided, among other things, that placards of a prescribed description and size are affixed to the cars containing the animals, and the way-bills, shipping memoranda, etc., are annotated with certain words. The object of these regulations is to insure that the live stock, when unloaded en route for food, water and rest in States not infected, or are transferred to other cars, shall be kept separate from cattle of the non-infected area, and not be placed in pens, cars, etc., used for cattle of the free area. These rules and regulations require further, that whenever said shipments are turned over to another transportation company or are transferred into other cars, or are re-billed or reconsigned at a point other than the original

destination, the cars in which the live stock are transferred, and the new way-bills, shipping memoranda, etc., relating to said shipments, shall be placarded and annotated as in the case of the cars first containing the animals, and the billing covering the same. If for any reason the placards required by the regulations are removed from the car, or are destroyed or rendered illegible, they shall be immediately replaced by the transportation company at the time in possession of the shipment, the intent being that placards shall be maintained on the cars from the time of shipment until they arrive at destination. To accomplish the object and purpose of the act, the prevention of the dissemination of contagious, infectious or communicable diseases of live stock, therefore, it will be readily apparent that it is of equal or greater importance to control the transportation of live stock in the hands of subsequent and connecting carriers as the receiving and transportation by initial carriers. The defendant argues that as the act provides that "no railroad company, etc., shall receive for transportation, etc.," it shows an intention upon the part of Congress to make the initial carrier alone liable, and this appears to be in large measure, the grounds upon which the decision was based in *U. S. vs. Chicago, B. and Q. R. Co.*, 181 F. R. 882. This argument, however, overlooks the fact that while the act makes the receiving for transportation an offence, it expressly provides further that the act of transportation itself shall constitute an offence. It is also contended that the offence of transportation is complete as soon as the first carrier crosses the State line, but under the facts of the indictment in the case at bar, the offence which is charged, namely, transportation from Alabama into Greenville County, South Carolina, was not complete until the cattle arrived within the prohibited territory. There is nothing in the indictment, nor in the rules and regulations to show that it was any offence on the part of the Nashville, Chattanooga and St. Louis Railway Company to transport cattle from Alabama to Atlanta, Ga., but on the contrary, the indictment and rules and regulations show that the offence denounced was transporting from Alabama into certain counties of South Carolina, Greenville County being one of the counties into which such importation was prohibited. The whole offence charged in the indictment was transportation from Alabama into Greenville County, S. C. The defendant company is liable because it transported the cattle from Atlanta, Ga., to Greenville, S. C., when the cattle came originally from Alabama under a through shipment or consignment. Each road took part in the unlawful transportation, and each should be liable.

As it is contended that this is a penal statute and must be strictly construed, it may be well to quote some observations of Mr. Justice Story in *Taylor vs. United States*, 3 Howard, 210: "In

one sense every law imposing a penalty or forfeiture may be deemed a penal law, in another sense such laws are often deemed, and truly deserve to be called remedial. The judge was therefore strictly accurate when he stated that 'it must not be understood that every law which imposes a penalty is therefore legally speaking a penal law, that is a law which is to be construed with great strictness in favor of the defendant.' Laws enacted for the prevention of fraud, or for the suppression of a public wrong, or to effect a public good, are not in the strict sense penal acts, although they may inflict a penalty for violating them." The interpretation of this statute as given above does not seem to present any serious difficulty. The object of the act is to prevent the spread of contagious, infectious or communicable disease among cattle. This is a highly proper purpose. It is in every sense a remedial statute, and should be so construed as most effectually to accomplish the intention of the legislature in enacting it. The indictment sets forth facts which tend to show a violation of the act on the part of the defendant company, and the demurrer cannot be sustained.

An order in the usual form over-ruling it will therefore be entered.

MAY 1, 1911.

[Cir. 50]



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—CIRCULAR No. 51.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the District Court for the District of Minnesota overruling claimant's exceptions to libel for condemnation and forfeiture under section 10 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768).

SYLLABUS.¹

1. Seizures prior to the filing of libels are not necessary to confer jurisdiction over proceedings for condemnation and forfeiture under the Food and Drugs Act. The act authorizes no person to make seizure before proceedings are commenced in court, and the terms of section 10 indicate that a libel must be filed before property is seized.

2. The want of sufficient verification is no ground for exception or demurrer to the substance of a libel filed under section 10 of the Food and Drugs Act. Furthermore, libels filed on behalf of the United States are excepted by the admiralty rule of this court from the requirement of verification.

3. Failure to allege the date of shipment from a foreign state, or to identify sufficiently the *res*, are not proper grounds for exceptions to libels filed under section 10 of the Food and Drugs Act. Matters of defense thus suggested may be raised by answer.

4. In view of the decision of the Supreme Court in *Hipolite Egg Co. v. United States*, it is unnecessary to allege in libels for condemnation under the Food and Drugs Act that articles of food have been transported for sale. Nor is it material that consignees of seized articles of food do not intend to sell them, but to use them for manufacturing purposes.

5. Adulterated articles of food are liable to seizure and condemnation under section 10 of the Food and Drugs Act as long as they remain in original unbroken packages.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

UNITED STATES OF AMERICA	} Libel for condemnation.
<i>vs.</i>	
TWO BARRELS OF DESICCATED EGGS.	

WILLARD, District Judge. This is a proceeding under section 10 of the food and drugs act of June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]), Armour & Co. appeared as claimant of the property, and has filed exceptions to the libel.

¹ Not by the court.

1. The first exception is as follows:

That it appears upon the face of said libel that at the time of the filing thereof no seizure of the property therein described had been made by the libelant, and that this court has, therefore, no jurisdiction over said property.

The claimant says that for the last 100 years it has been the rule in admiralty that in seizure cases the jurisdiction depended upon the fact that a seizure had been made before the libel was filed, and that, no prior seizure having been made in this case, the court has no jurisdiction.

It may be said, in the first place, that this is not a case of admiralty or maritime jurisdiction. The jurisdiction of the District Court is conferred by the act itself. The only connection that the proceeding has with admiralty is due to the fact that section 10 provides that the proceedings in such cases shall conform as near as may be to proceedings in admiralty. Section 7 of the Confiscation Act of July 17, 1862, c. 195, 12 Stat. 589, contained a similar provision; it being there stated that the "proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases." It was said, however, in *The Confiscation Cases*, 20 Wall. 92, at page 110, 19 L. Ed. 196, that:

Strict conformity is not required. No doubt in cases of seizure upon land resort should be had to the common-law side of the court, and such, in substance, was, we think, the case here.

But, admitting that in cases of this kind the procedure in admiralty requires a prior seizure, it is, of course, unquestioned that Congress could change such procedure, and provide that the libel should be first filed, and then a warrant issued for the arrest of the property, making the proceeding in that respect similar to a proceeding in rem in admiralty between private persons. The only question therefore is, What in this respect does the act itself provide? If there is to be a seizure prior to any proceeding in court, there must be some provision, either in this act or in some other act, authorizing some one to make such seizure. There is nothing in the law which authorizes any one, either a private person or a public officer, to do so. By section 4 the Secretary of Agriculture is authorized to make investigations, and, if he finds that any provision of the act has been violated, he is required to certify the facts to the United States district attorney, but there is nothing here which gives him or any agent power to seize the property. Section 5 requires the district attorney, upon being informed that the act has been violated, to cause appropriate proceedings to be commenced in the proper court. This does not authorize him or the marshal or any other person to seize the property before such proceedings are commenced in court. No other law has been referred to by counsel authorizing any officer to make the seizure provided for by this act

prior to a proceeding in court. It is true that in *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381, Mr. Justice Story, delivering the opinion of the court, said, on page 308, "at common law, any person may, at his peril, seize for a forfeiture to the government"; but he added:

In the absence of all positive authority, it might be proper to resort to these principles in aid of the manifest purposes of the law. But there are express statutable provisions, which directly apply to the present case.

It appeared there that the seizure was made by the collector and surveyor of the port of New York, who it was held by the court were expressly authorized to make a seizure by the act of February 18, 1793. The same justice delivering the opinion of the court in *The Josefa Segunda*, 10 Wheat. 312, said on page 329, 6 L. Ed. 329:

Under this clause, standing alone, it cannot be doubted that any person might lawfully seize such a vessel at his peril.

But it was distinctly held that the Collection Act of 1799, c. 128, § 70, made it the duty of customhouse officers to make seizures of all vessels violating the revenue laws, and the seizure was in fact made by the collector of the port of New Orleans. A fair construction of the food and drugs act does not require a holding that the seizure mentioned therein can be made by a private person. Such a provision would seem to be contrary to the general policy of the law in seizure cases. As is seen hereafter, in almost all of them, specific statutory provisions have authorized determined persons to make such seizures. To allow a private person to enter upon the premises of another, without any warrant or authority of law whatever, and to search and to seize any property which he might think was subject to confiscation, even though he did so at his peril, might lead to breaches of the peace and the disturbance of the public order. Whether the common law which allowed such a proceeding would be consistent with our constitutional provisions relating to seizures and searches presents a question of some difficulty. It cannot be held that the act in question intended to allow such a proceeding. There is nothing therefore in the law which authorizes any private person or public officer to make the seizure prior to the commencement of some proceeding in court.

An examination of the cases decided by the Supreme Court, and cited by the claimant, shows that in each one of them there was some specific provision in the law authorizing the person who did make the seizure to so make it prior to the filing of the libel. The case principally relied upon in support of the exception is the *Brig Ann*, 9 Cranch, 289, 3 L. Ed. 734. In that case the Intercourse Act of March 1, 1809, c. 24, 2 Stat. 528, under which the seizure was made, expressly authorized in section 8 every collector, naval officer, surveyor, or other officer of the customs to seize any property imported contrary to law;

and the merchandise in question in that case was in fact seized by a revenue cutter. In the *Josefa Segunda*, above cited, the ship was seized for a violation of the Act of March 3, 1807, c. 22, 2 Stat. 426, relating to the slave trade. Section 7 of that act authorized the President of the United States to direct the commanders of armed vessels of the United States to seize and bring into ports of the United States any such vessels. In *Clifton v. U. S.*, 4 How. 242, 11 L. Ed. 957, goods imported into New York and transferred to Philadelphia were seized by the customs officers there, under a claim of forfeiture by reason of undervaluation. That seizure was expressly authorized by the Act of March 2, 1799, c. 22, § 66, 1 Stat. 677. In the case of *United States v. 43 Gallons of Whisky*, 93 U. S. 188, 23 L. Ed. 846, the property was seized by an Indian agent. This seizure was expressly authorized by section 20 of the Act of March 15, 1864, c. 33, 13 Stat. 29. In *Coffey v. United States*, 116 U. S. 427, 6 Sup. Ct. 432, 29 L. Ed. 681, the distilling apparatus was seized by a deputy collector of internal revenue. He was expressly authorized to make such a seizure by section 3453 of the Revised Statutes (U. S. Comp. St. 1901, p. 2278). In *United States v. Winchester*, 99 U. S. 372, 25 L. Ed. 479, the cotton in question was seized by the naval forces of the United States in 1863, and afterwards condemned in the district court. It was claimed by the Attorney General that the condemnation could be sustained under the Confiscation Act of July 17, 1862, c. 195, 12 Stat. 589. That act declared in section 6 that it should be the duty of the President to seize property so made subject to confiscation.

Section 7 of that act provided that, after the property should have been seized, a proceeding in rem should be instituted in the District Court. It was held that the decree of condemnation was invalid because there was no previous seizure of the property under any order of the executive. It will be noted that in that case there was a seizure in fact, but the court held that the seizure could not confer jurisdiction upon the District Court, because it was not made by a person who was authorized to make it. This would seem to support the view hereinbefore stated, to the effect that under the law now existing in the United States a private person cannot seize property forfeited to the government. When the terms of the food and drugs act, which relate specifically to the seizure, are considered, it will be seen that they lend no support to the theory that there must be a seizure before the filing of the libel. If the phrase "for the enforcement of the penalties," found in section 5, can be said to include a forfeiture, it is still to be observed that the district attorney is required to cause the appropriate proceedings to be commenced in court. Section 10 nowhere provides that the property shall be seized, and then a libel filed for condemnation. It, on the contrary, provides that the article if adulterated shall

be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. This language indicates that the procedure shall be commenced in the District Court before the property is seized. In most of the cases which have arisen under the act to which my attention has been called, it seems that libels were filed before the seizure. *United States v. 779 Cases of Molasses*, 174 Fed. 325, 98 C. C. A. 197; *United States v. 100 Cases of Tepee Apples (D. C.)* 179 Fed. 987; *United States v. 5 Boxes Asafœtida (D. C.)* 181 Fed. 561; *United States v. 68 Cases of Syrup (D. C.)* 172 Fed. 781; *United States v. 65 Casks Liquid Extracts (D. C.)* 170 Fed. 449; *United States v. 50 Barrels of Whisky (D. C.)* 165 Fed. 966.

The first exception to the libel is therefore overruled. A similar exception was sustained in a case in the Southern District of Ohio reported in a bulletin issued by the Department of Agriculture on January 12, 1911, entitled Notice of Judgment, No. 697, Food and Drugs Act. For the reasons hereinbefore stated, I cannot agree with the conclusion reached in that case.

2. The second exception to the libel is as follows:

That the libel herein was not verified by any person having knowledge of the facts therein set forth, and that no probable cause for the seizure of said property is shown.

The libel was, in fact, verified by the district attorney as of his own knowledge. Moreover, rule 1 of the admiralty rules of this court provides that libels shall be verified, except those filed on behalf of the United States. It may be added, also, that, whatever objections might have been made to the issuance of the warrant to the marshal founded upon such a verification, the want of a sufficient verification is no ground for exception or demurrer to the substance of the libel.

The second exception is overruled.

3. The third exception is based upon the fact that the date when the eggs were shipped from Chicago is not stated; that, therefore, this shipment might have been made before the food and drugs act went into effect; and that the property is not sufficiently identified. In *The Confiscation Cases*, 20 Wall. 92, it was said on page 106, 19 L. Ed. 196.

In admiralty proceedings a libel in the nature of an information does not require all the formality and technical precision of an indictment at common law.

And on page 107 of 20 Wall., 19 L. Ed. 196:

In proceedings in admiralty the same strictness is not required as in proceedings in common-law courts. And where the seizure is on land [said he], although the proceedings would seem to be analogous to informations in the Exchequer, yet I do not know that in our courts the rigid principles of the common law applicable to such informations have been solemnly recognized.

In *Oakes v. United States*, 174 U. S. 778, 790, 19 Sup. Ct. 864, 868, 43 L. Ed. 1169, it was said:

The proceedings were in conformity with the practice in admiralty, and were not governed by the strict rules that prevail in regard to indictments or criminal informations at common law.

The defenses suggested by these exceptions can without difficulty be raised by the claimant in its answer. They are accordingly overruled.

4. It is said in claimant's brief that the fourth, fifth, and sixth exceptions are founded upon the same omission in the libel, namely, that it does not allege that the eggs have been transported for sale. During the hearing it was stated at the bar that as a matter of fact the Loose-Wiles Biscuit Company did not intend to sell the eggs, but to use them in manufacturing. At the time the exceptions were argued (March 10th) this contention presented a serious question. But three days thereafter (March 13, 1911) the Supreme Court decided the case of the *Hipolite Egg Co. v. United States*, 219 U. S. —, 31 Sup. Ct. 364, 55 L. Ed. —. The facts of that case are therein stated, as follows:

On March 11, 1909, the United States instituted libel proceedings under section 10 of the act of Congress of June 30, 1906, c. 3915, 34 Stat. 771 (U. S. Comp. St. Supp. 1909, p. 1193), against 50 cans of preserved whole eggs which had been prepared by the Hipolite Egg Company of St. Louis, Mo. The eggs before the shipment alleged in the libel were stored in a warehouse in St. Louis for about five months, during which time they were the property of Thomas & Clark, an Illinois corporation engaged in the bakery business at Peoria, Ill. Thomas & Clark procured the shipment of the eggs to themselves at Peoria, and upon their receipt of them placed the shipment in the storeroom in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original, unbroken packages or otherwise, and were not so sold. The Hipolite Egg Company appeared as claimant of the eggs, intervened, filed an answer, and defended the case, but did not enter into a stipulation to pay costs.

The claims of the egg company, as far as they are material here, are stated by the court as follows:

The egg company, whilst not contending that the shipment of the eggs was not a violation of section 2 of the act, and a misdemeanor within its terms, and not denying the power of Congress to enact it, presents three contentions: (1) Section 10 of the food and drugs act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product. (2) A United States District Court has no jurisdiction to proceed in rem under section 10 against goods that have passed out of interstate commerce before the proceeding in rem was commenced.

After discussing the cases cited by the claimant upon the hearing in the case at bar, the Supreme Court declared that the first contention of the egg company was untenable.

The fourth, fifth, and sixth exceptions are accordingly overruled.

5. The seventh exception is based on the claim that it nowhere appears that the eggs in question are still subject to the provisions of

the act. It is said that the power of the federal government over interstate shipments ceases when the shipments become a part of the state property. It will be noticed that this question also was raised in the case of the *Hipolite Egg Co. v. United States*, *supra*. In answer to the second claim of the egg company, which has heretofore been stated, the court said:

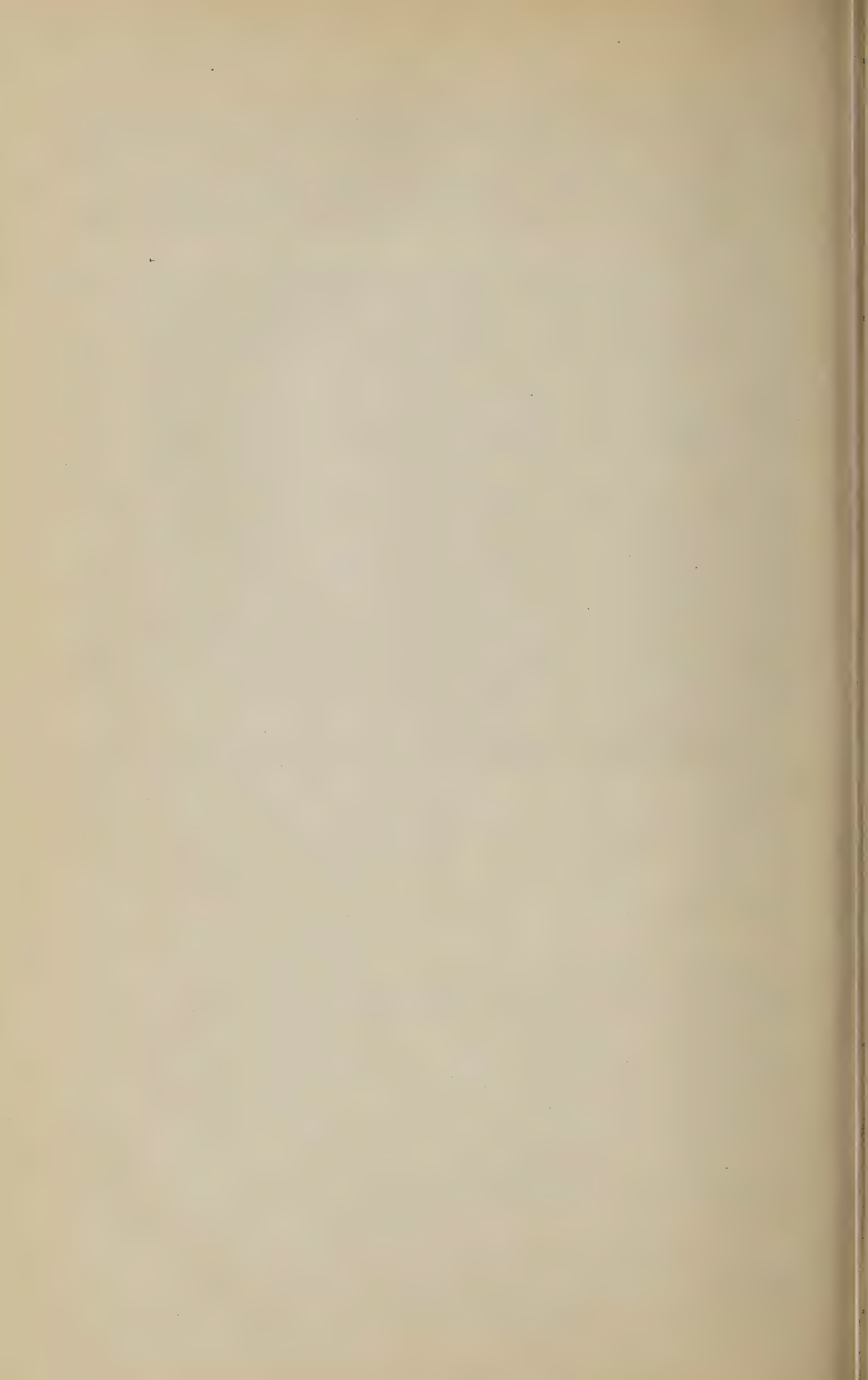
There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the national government when they are within the borders of a state. The question in the case, therefore, is: What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property. To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or, rather, to prevent trade in them between the states by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution. *McCulloch v. Maryland*, 4 Wheat. 316 [4 L. Ed. 579]; *Lottery Case*, 188 U. S. 321, 355 [23 Sup. Ct. 321, 47 L. Ed. 492].

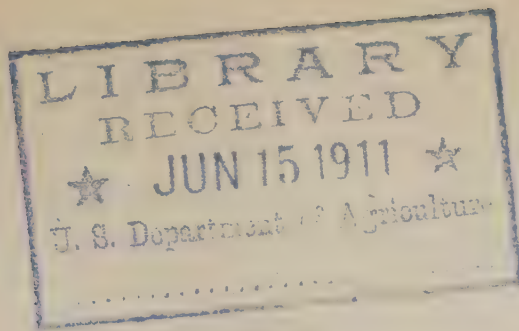
The seventh exception is accordingly overruled.

The claimant is given 10 days from this date within which to answer the libel.

[Cir. 51]

O





Issued June 12, 1911.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 52.

GEO. P. McCABE, Solicitor.

NATIONAL FORESTS ORGANIC AND ADMINISTRATIVE ACTS.

(ACTS OF MARCH 3, 1891, AND JUNE 4, 1897.)

Decision of the Supreme Court of the United States Sustaining Power of Congress to Provide for Creation of National Forests and for their Administration under Rules and Regulations Made and Promulgated by the Secretary of Agriculture.

The decision of the Supreme Court of the United States, rendered on May 1, 1911, in the case of *Fred Light v. The United States*, sets at rest the somewhat disputed question as to the power of Congress to provide for the reservation of public lands in the States for national forest purposes. The decision also sustains the constitutionality of the forest administration act of June 4, 1897, and the validity of regulations made and promulgated thereunder by the Secretary of Agriculture for the control of grazing upon the national forests.

The facts giving rise to the suit are stated in the opinion of the court, which is fully set forth in this circular. The suit was brought by the United States to restrain the defendant from pasturing or allowing his stock to graze on the Holy Cross National Forest in the State of Colorado in violation of the regulation of the Secretary of Agriculture requiring the owner of stock to secure a permit before grazing them thereon. The defendant, among other things, pleaded, and in argument contended, that the laws of Colorado at the time of the trespass required the owner of land to fence it against straying stock, and that as the national forest was not fenced the United States could not maintain a suit for injunction or an action at law for damages. In other words, it was asserted that the United States are bound by the laws of the States where the national forests are located, so far at least as respects the fencing of lands, under the State law,

against trespassing stock. This abstract question was not decided by the Supreme Court, since its determination was rendered unnecessary by the finding that the cattle in this case were intentionally allowed to trespass on the forest, and were not, therefore, within the rule that owners of stock which stray upon unfenced land, which the laws of the State require to be fenced, are excused from liability therefor.

The following is the substance of the decision:

1. The United States can prohibit absolutely or fix the terms on which its property may be used, and can withhold or reserve the land indefinitely, and this, without the consent of the State in which it is situated.

2. The long-continued sufferance by the United States of the pasturing of cattle on the public lands did not confer upon anyone a vested right to the use of those lands for that purpose; nor could it deprive the United States of the power of recalling the implied license arising therefrom so to do.

3. The Government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and prosecute trespassers, and it may deal with such lands precisely as an ordinary individual may deal with his farming property. (United States v. Canfield, 167 U. S., 524.)

4. Section 24 of the act of March 3, 1891, authorizing the President of the United States to set apart and reserve public lands bearing forests as national forests, is constitutional.

5. The act of June 4, 1897, conferring upon the Secretary of Agriculture authority to make rules and regulations for the administration of the national forests is constitutional, and the regulation of the Secretary of Agriculture, made and promulgated thereunder, requiring all persons to secure permits before grazing any stock in a national forest, is valid and enforceable. (United States v. Grimaud, decided same day.)

6. Statutes providing that no recovery can be had for damage done by trespassing animals unless the land had been inclosed with a fence of the size and material required by State law do not give permission to the owner of cattle to use another's unfenced land as a pasture, and, therefore, if the statute of Colorado requiring owners to fence their land against straying stock is at all enforceable against the United States, such a statute does not afford immunity to one who intentionally and willfully pastures and allows his stock to graze in the national forests.

7. Where cases in the Supreme Court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued, and is not departed from without important reasons.

The following is the opinion of the court:

SUPREME COURT OF THE UNITED STATES.

No. 360.—OCTOBER TERM, 1910.

FRED LIGHT, <i>Appellant</i> ,	}	Appeal from the Circuit Court of the United States for the District of Colorado.
<i>vs.</i>		
THE UNITED STATES.		

[May 1, 1911.]

The Holy Cross Forest Reserve was established under the provisions of the act of March 3, 1891. By that and subsequent statutes

the Secretary of Agriculture was authorized to make provisions for the protection against destruction by fire and depredations of the public forest and forest reservations and "to make such rules and regulations and establish such service as would insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction." 26 Stat. L. 1103, 30 Stat. L. 35, Act of Congress February 1, 1905; 7 Fed. Stat. Ann. 310, 312, and Supp. for 1909, page 663. In pursuance of these statutes regulations were adopted establishing grazing districts on which only a limited number of cattle were allowed. The regulations provided that a few head of cattle of prospectors, campers and not more than ten belonging to a settler residing near the forest might be admitted without permit, but saving these exceptions the general rule was that "all persons must secure permits before grazing any stock in a national forest."

On April 7, 1908, the United States, through the district attorney, filed a bill in the Circuit Court for the District of Colorado reciting the matters above outlined, and alleging that the defendant Fred Light owned a herd of about 500 cattle and a ranch of 540 acres, located two and a half miles to the east and five miles to the north of the reservation. This herd was turned out to range during the spring and summer, and the ranch then used as a place on which to raise hay for their sustenance.

That between the ranch and the reservation, was other public and unoccupied land of the United States; but, owing to the fact that only a limited number of cattle were allowed on the reservation, the grazing there was better than on this public land. For this reason, and because of the superior water facilities and the tendency of the cattle to follow the trails and stream leading from the ranch to the reservation, they naturally went direct to the reservation. The bill charged that the defendant when turning them loose knew and expected that they would go upon the reservation, and took no action to prevent them from trespassing. That by thus knowingly and wrongfully permitting them to enter on the reservation he intentionally caused his cattle to make a trespass, in breach of the United States property and administrative rights, and has openly and privately stated his purpose to disregard the regulations, and without permit to allow and, in the manner stated, to cause his cattle to enter, feed and graze thereon.

The bill prayed for an injunction. The defendant's general demurrer was overruled.

His answer denied that the topography of the country around his ranch or the water and grazing conditions were such as to cause his cattle to go on the reservation; he denied that many of them did go thereon, though admitting that some had grazed on the reservation.

He admitted that he had liberated his cattle without having secured or intending to apply for a permit, but denied that he willfully or intentionally caused them to go on the reservation, submitting that he was not required to obtain any such permit. He admits that it is his intention hereafter, as heretofore, to turn his cattle out on the unreserved public land of the United States adjoining his ranch to the northeast thereof, without securing or applying for any permit for the cattle to graze upon the so-called Holy Cross Reserve; denies that any damage will be done if they do go upon the reserve; and contends that, if because of their straying proclivities, they shall go on the reserve, the complainant is without remedy against the defendant at law or in equity so long as complainant fails to fence the reserve as required by the laws of Colorado. He claims the benefit of the Colorado statute requiring the owner of land to erect and maintain a fence of given height and strength, in default of which the owner is not entitled to recover for damage occasioned by cattle or other animals going thereon.

Evidence was taken, and after hearing, the Circuit Court found for the Government and entered a decree enjoining the defendant from in any manner causing, or permitting, his stock to go, stray upon or remain within the said forest or any portion thereof.

The defendant appealed and assigned that the decree against him was erroneous; that the public lands are held in trust for the people of the several States, and the proclamation creating the reserve without the consent of the State of Colorado is contrary to and in violation of said trust; that the decree is void because it in effect holds that the United States is exempt from the municipal laws of the State of Colorado relating to fences; that the statute conferring upon the said Secretary of Agriculture the power to make rules and regulations was an unconstitutional delegation of authority to him and the rules and regulations therefore void; and that the rules mentioned in the bill are unreasonable, do not tend to insure the object of forest reservation and constitute an unconstitutional interference by the government of the United States with fence and other statutes of the State of Colorado, enacted through the exercise of the police power of the State.

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the Court.

The defendant was enjoined from pasturing his cattle on the Holy Cross Forest Reserve, because he had refused to comply with the regulations adopted by the Secretary of Agriculture, under the authority conferred by the Act of June 4, 1897, (30 Stat. 35) to make rules and regulations as to the use, occupancy and preservation of

forests. The validity of the rule is attacked on the ground that Congress could not delegate to the Secretary legislative power. We need not discuss that question in view of the opinion in *United States v. Grimaud*, just decided.

The bill alleged, and there was evidence to support the finding, that the defendant, with the expectation and intention that they would do so, turned his cattle out at a time and place which made it certain that they would leave the open public lands and go at once to the Reserve, where there was good water and fine pasturage. When notified to remove the cattle, he declined to do so and threatened to resist if they should be driven off by a forest officer. He justified this position on the ground that the statute of Colorado provided that a landowner could not recover damages for trespass by animals unless the property was enclosed with a fence of designated size and material. Regardless of any conflict in the testimony, the defendant claims that unless the Government put a fence around the Reserve it had no remedy, either at law or in equity, nor could he be required to prevent his cattle straying upon the Reserve from the open public land on which he had a right to turn them loose.

At common law the owner was required to confine his live stock, or else was held liable for any damage done by them upon the land of third persons. That law was not adapted to the situation of those States where there were great plains and vast tracts of unenclosed land, suitable for pasture. And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent. *Buford v. Houtze*, 133 U. S. 326. Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes. *Steele v. United States*, 113 U. S. 130; *Wilcox v. Jackson*, 13 Pet. 513.

It is contended, however, that Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the State where it is located; and it is then argued that the act of 1891 providing for the establishment of reservations was void, so that what is nominally a Reserve is, in law, to be treated as open and uninclosed land, as to which there still exists the implied license that it may be used for grazing purposes. But "the Nation is an owner, and has made Congress the principal agent to dispose of its property." . . . "Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of." *Butte City Water Co. v. Baker*, 196 U. S. 126. "The Government has with respect to its own land the rights of an ordi-

nary proprietor to maintain its possession and prosecute trespassers. It may deal with such lands precisely as an ordinary individual may deal with his farming property. It may sell or withhold them from sale." *United States v. Canfield*, 167 U. S. 524. And if it may withhold from sale and settlement it may also as an owner object to its property being used for grazing purposes, for "the Government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation." *United States v. Beebee*, 127 U. S. 342.

The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely. *Stearns v. Minnesota*, 179 U. S. 243. It is true that the "United States do not and cannot hold property as a monarch may for private or personal purposes." *Van Brocklin v. Tennessee*, 117 U. S. 158. But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, sec. 3, art. IV, that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States." "The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property." *Kansas v. Colorado*, 206 U. S. 89.

"All the public lands of the nation are held in trust for the people of the whole country," *United States v. Trinidad Coal Co.*, 138 U. S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it. Even a private owner would be entitled to protection against willful trespasses, and statutes providing that damage done by animals cannot be recovered, unless the land had been inclosed with a fence of the size and material required, do not give permission to the owner of cattle to use his neighbor's land as a pasture. They are intended to condone trespasses by straying cattle; they have no application to cases where they are driven upon unfenced land in order that they may feed there. *Lazarus v. Phelps*, 152 U. S. 81; *Moore v. Cannon*, 24 Mont. 324; *St. Louis Cattle Co. v. Vaught*, 1 Tex. App. 388; *The Union Pacific v. Rollins*, 5 Kans. 176.

Fence laws do not authorize wanton and willful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another.

This the defendant did, under circumstances equivalent to driving his cattle upon the forest reserve. He could have obtained a permit for reasonable pasturage. He not only declined to apply for such license, but there is evidence that he threatened to resist efforts to have his cattle removed from the Reserve, and in his answer he declares that he will continue to turn out his cattle, and contends that if they go upon the Reserve the Government has no remedy at law or in equity. This claim answers itself.

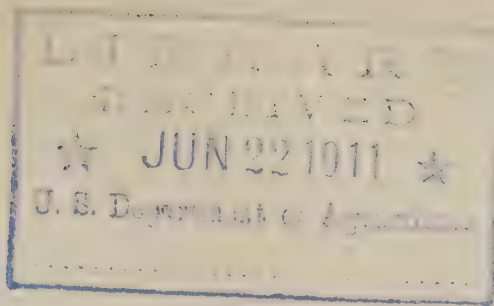
It appears that the defendant turned out his cattle under circumstances which showed that he expected and intended that they would go upon the reserve to graze thereon. Under the facts the court properly granted an injunction. The judgment was right on the merits, wholly regardless of the question as to whether the Government had enclosed its property.

This makes it unnecessary to consider how far the United States is required to fence its property, or the other constitutional questions involved. For, as said in *Siler v. Louisville & Nashville R. R.*, 213 U. S. 23, "where cases in this court can be decided without reference to questions arising under the Federal Constitution that course is usually pursued, and is not departed from without important reasons." The decree is therefore

Affirmed.

[Cir. 52]





Issued June 22, 1911.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 53.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Circuit Court of the United States for the District of Oregon, in a case involving violation of the Act of June 29, 1906 (34 Stat., 607).

SYLLABUS.¹

(1) In an action against a terminal company, for a violation of the Twenty-eight Hour Law, it was urged in defense that, finding the cattle in cars at a point where they could not otherwise be unloaded for rest, water, and feed, it became the duty of the terminal company to carry them to the stock yards for unloading. *Held*, That in such a case, the terminal company was transporting the stock over one part of the through line of transportation in interstate commerce, that the company is not excusable because it accepted and transported the stock for a humane purpose, that the enforcement of the law is better subserved if connecting carriers refuse to carry any stock that has been confined in cars by a preceding carrier beyond the statutory limit.

(2) Every railroad company, forming any part of an interstate line, over which live stock is being shipped, that participates in transporting such stock beyond the statutory limit, acts in contravention of the law.

(3) It is no defense, in an action against a connecting carrier, to say that the initial carrier, which had itself violated the law on the same shipment, had been fined therefor.

(4) *United States v. Stock Yards Terminal Co.* (172 Fed., 452), not followed.

(5) XXV Op. Atty. Gen., 411, *Union Stock Yards Co. v. United States* (169 Fed., 404), and *United States v. Sioux City Stock Yards Co.* (162 Fed., 556), followed and approved.

(6) *Baltimore & Ohio Southwestern Railroad Co. v. United States* (decided Mar. 20, 1911, Circular No. 46, Office of the Solicitor), followed.

¹ Not by the court.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT
OF OREGON.

UNITED STATES OF AMERICA	} Nos. 3216, 3217, 3218, 3219, 3220
v.	
NORTHERN PACIFIC TERMINAL CO.	} consolidated.

JOHN McCOURT, United States Attorney,
DOLPH, MALLORY, SIMON & GEARIN for Defendant.

WOLVERTON, *District Judge*:

Five cases instituted by the Government against the Northern Pacific Terminal Company, to recover for violation of the Twenty-eight Hour Law upon five shipments of beef cattle, have been consolidated. The cattle were carried by the Southern Pacific Company, in two train-loads, from Gazelle, in the State of California, to Portland, Oregon, being destined to Tacoma, Washington. The Terminal Company received and carried them to the Union Stock yards, where they were unloaded for rest, food and water. One train-load, containing two shipments, was 34 hours and 45 minutes in transit to Portland. Accompanying these were written requests to extend the time for confining the stock in cars to thirty-six hours. Another train-load, comprising three shipments, was 36 hours and 10 minutes in transit. The Terminal Company had the first train-load in transit 1 hour and 55 minutes, making a continuous carriage of the cattle without unloading of 36 hours and 40 minutes. It had the second load in transit 50 minutes, making a continuous carriage of 37 hours. The distance from the point where the Terminal Company received the stock from the Southern Pacific Company to the Union Stock yards is about 1,000 feet. The Terminal Company maintains terminal facilities at Portland for the use of the Northern Pacific Railway Company, the Oregon Railroad and Navigation Company, and the Southern Pacific Company, they owning the capital stock of the Terminal Company and bearing proportionally the expenses of conducting the terminal yards. All interstate shipments by any one of these railroad companies to be carried also over the lines of another are delivered to such other through the yards of the Terminal Company. The Terminal Company issues no bills of lading or shipping receipts, and receives none to itself, and neither charges nor receives freight, but in all such relations acts solely at the request and direction of the company so delivering or receiving the shipment. The terminal yards consist of thirty-eight acres of land in area, over which the Terminal Company maintains tracks and switches, running the distance of about 3,000 feet. The Union Stockyards are adjacent to these tracks. The cattle in question were received by the Terminal Company for the purpose of transporting the same to the stockyards,

for unloading and rest, before forwarding them to destination by connecting carrier, under instructions from the Southern Pacific Company, and such transportation and unloading were done pursuant to the provisions of an agreement among the several railroad companies for whose use the Terminal Company is maintained, by the terms of which the employees of the Terminal Company are deemed to be the separate employees for the time being of the railroad company for which the Terminal Company is acting. The Terminal Company, upon receiving the cattle from the Southern Pacific Company promptly switched the cars containing them to and upon the tracks entering the Union Stockyards, and without unnecessary delay unloaded the same. The Terminal Company was notified and informed by the chief dispatcher of the Southern Pacific Company, before the former received the cattle from the latter, as to the length of time the latter had same in transportation. The Southern Pacific Company has been prosecuted for a violation of the law as to each of the five shipments, and has paid a fine.

Upon these facts, which are in substance as stipulated, the question of the liability of the Terminal Company also to prosecution under the act is presented.

Apparently there is some mistake respecting the prosecution of the Southern Pacific Company for the two shipments by the first train-load designated above, as the company was not legally liable therefor, by reason of the extension of time for confinement of the cattle by request of the shipper. In reality, there had not been thirty-six hours of continuous carriage when the Terminal Company received the cattle; but adding the two periods named, the time in which the Southern Pacific Company had the stock in transit and that consumed by the Terminal Company in delivering to the stockyards, 36 hours and 40 minutes elapsed, being forty minutes in excess of the time limited by law. As it pertains to the second train-load, there had been a continuous carriage of more than thirty-six hours before taken in charge by the Terminal Company.

Four objections are interposed against the prosecution, which will be considered in the order adopted by counsel. First, it is urged that the time consumed in loading and unloading stock is not to be considered as a part of the time of confinement in cars. This is undoubtedly a sound construction of the law. But the allegation of the complaint as to each of such shipments is that the cattle were confined in transit for more than thirty-six consecutive hours, namely, in the one case 36 hours and 40 minutes, and in the other 37 hours, without unloading, and this is admitted by the stipulation to be true. The language of the stipulation is as follows:

“That said cattle were not unloaded from the time of reloading at Gazelle, California, as set forth in said amended complaint, until

they were placed by the Terminal Company in the stockyards at Portland, as stated in said amended complaint."

This objection is, therefore, not well taken.

Second, counsel say:

"The time limit as fixed by the Act had already expired when the cattle were received by the defendant. That constituted violation of the Act. Recovery has been had for the offense against the Act thereby committed and the time thus accounted for cannot be charged against this defendant."

The time limit had undoubtedly run as to the three shipments comprising the second train-load, but not as to the two shipments by the first, whatever might have been done towards prosecuting the Southern Pacific Company for its part in the carriage. But, conceding the fact, I am unable to agree with counsel that, because the offense had been committed by the Southern Pacific Company, and prior to the time when the stock was received in charge by the Terminal Company, the latter company is not amenable for what it did in continuing the carriage. The act includes all carriers and connecting carriers. If it be that one carrier has held stock in transit for less than the time limit, and delivers to another who continues the transportation, so that the combined time of carriage would exceed such limit, although the latter may not have carried for the full limit, it would undoubtedly be liable, if it had knowledge of the time consumed in carriage by the former. This must be conceded; otherwise the law would be in many instances a dead letter. In such a case, the first carrier would not be liable, because he would not have been concerned in confining the stock for a longer time than limited by law. But suppose the first carrier has held stock in transit for more than the statutory time, and then delivers to another carrier who continues the transportation for twenty-seven hours longer, with knowledge of what preceded, would not the latter, being a connecting carrier, be concerned in carrying stock for a longer time than the law has prescribed, and would he not be just as guilty as the carrier who took up stock that had not been carried the limit as to time, and carried beyond such limit counting the combined time of carriage? Manifestly there is no escape from the conclusion. Suppose, again, that stock confined in cars has passed in transit through and upon the lines of three connecting carriers. Let the time consumed in passing over the first be twenty-seven hours, that over the second three hours, and that over the third twenty-seven hours, all continuous and with full knowledge of what had been previously done, could it be said that the second alone is liable, in the carriage of the stock so confined for a period of fifty-seven hours, more than double the time limit? The illustration may be varied so that each would carry twenty-seven hours; totaling eighty-one hours continuous confine-

ment of the stock, and yet could it be that only one of these carriers would be liable? The purpose of the statute is perfectly manifest. It is to inhibit any railroad company whose road forms any part of a line of road over which stock shall be conveyed from one state or territory into or through another, from confining such stock in cars for a greater length of time than therein specified, without unloading for rest, feed, and water. There is no violation of the law so long as the carriage does not exceed the time fixed, but whenever the continuous carriage without unloading does exceed the limit, then every railroad company forming any part of an interstate line, over which such stock is being shipped, that participates in such carriage beyond the limit, acts in contravention of the law. The deduction seems logical, and to follow as of course. Now, can it make any difference that any one of the railroad companies whose lines form a connecting link in the route of shipment has violated the law and been fined, if a company whose railroad forms a succeeding link in the through line also carries with knowledge that the stock has been in cars longer than the time fixed by law? The one participates in so carrying the stock as well as the other, and does so contrary to the inhibition of a direct statute. Why is not the one as guilty as the other? I am of the firm opinion that the true intendment of the statute is to make all carriers amenable thereto who participate in the carriage of stock in cars beyond the time limit for unloading. The liability is a several one, and all that have had a hand in the carriage beyond the time limit are alike guilty of the offense denounced. My attention has been called to a contrary holding in the case of *United States v. Stockyards Terminal Co.*, 172 Fed. 452, but, with all due respect for the opinion of the learned judge who decided that case, I am unable to agree with him. See opinion of Attorney General hereafter cited.

Third. It is insisted that, finding the cattle so confined at a place where they could not be otherwise unloaded for rest, water, and feed, except by being taken to the stockyards, it became the Terminal Company's humane duty to carry them to the stockyards for unloading. It must be borne in mind in this case, as will appear later on, that while the Terminal Company was carrying the stock to the stockyards, it was also carrying it over one line of the through line of transportation from Gazelle, California, to Tacoma, Washington, and I find no such exception in the law, that a connecting carrier may carry stock on to stockyards, although the same has been confined beyond the limit of time, for the purpose of releasing such stock. Nor is the Terminal Company excusable in violating the law that it might subserve a humane purpose, unless it be in exceptional cases. The enforcement of the law will be better subserved if connecting carriers will refuse to carry any stock that has been confined in cars by a preceding carrier beyond the time limit. Indeed, as I interpret

the statute, they violate the law if they do not so refuse. The Terminal Company could not be made amenable to the state law for prevention of cruelty to animals so long as it did not have charge or was not in possession of the stock. It was not bound to take it from the possession of the Southern Pacific Company. The dilemma was that company's, and none other was called upon to relieve it. Hence I hold that the Terminal Company rendered itself liable when it assumed possession for the purpose of forwarding the stock on its way to destination.

Fourth. The point here made is that the defendant was acting as the agent of and under the direction of the Southern Pacific Company, and, the principal having been recovered against, this action cannot be maintained. This objection is answered in part under the second point. The further answer is, that the Terminal Company is a distinct corporation and entity from any of the associate railroad companies for which it operates its terminal yards, and is not specially controlled in its action by any of such associate companies. While it does the switching for said companies, and this possibly in the capacity of an agent, it has a distinct function to perform, and that it performs in its own way, and as it can at its own behest. Almost the identical question arose through the action of the St. Louis Merchants Bridge Terminal Railway Association, and was submitted to the Honorable W. H. Moody, Attorney General, for his decision. The National stockyards lie directly across the Mississippi River from St. Louis, Missouri. The St. Louis Merchants Bridge Terminal Company is a distinct corporation, but controlled by the Terminal Railroad Association of St. Louis, Missouri, by reason of the latter company's ownership of a majority of the capital stock. By means of its owned, operated, and leased lines the Terminal Railroad Association is the only company which can transport live stock from St. Louis to the National stockyards, the run to which is made in from one to three hours. Answering the Secretary of Agriculture under this state of facts, the Attorney General says:

“ You state ‘ the view of the officers of the department having the matter in charge has been that any railroad company whose road forms any part of a line over which live stock is conveyed from one State to another, which confines said live stock in cars for a period longer than twenty-eight consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from so doing by storm or other accidental causes, or unless the live stock is carried in cars in which it can and does have opportunity for feed, rest, and water, is a violator of the law. Further, that following the plain language of the statute, the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included in estimating such confinement.’ ”

"I concur in this interpretation of the law, and upon the facts stated it is my opinion that the law applies to these terminal railroad companies. The statute is unambiguous, and is clearly designed to prevent any 'railroad company within the United States whose railroad forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another,' from transporting such animals under conditions other than those set forth in the statute. It seems to be clear from your statement of the facts that these terminal companies accept stock for transportation to the National Stockyards that has already been confined for more than 28 consecutive hours without unloading for feed, rest, and water. That being so, the companies are undoubtedly liable for the penalty which the statute provides."—Circular No. 27, U. S. Department of Agriculture, issued December 10, 1909.

To the same purpose is the holding of the United States Court of Appeals for the Eighth Circuit: *Union Stock Yards Co. v. United States*, 169 Fed. 404. See also *United States v. Sioux City Stock Yards Co.*, 162 Fed. 556.

It has been held by this court that this Terminal Company is a connecting carrier within the purview of the Safety Appliance Act while engaged in moving cars used in interstate traffic. *United States v. Northern Pac. Terminal Co.*, 144 Fed. 861.

However, it has been recently held by the Supreme Court that the shipment does not constitute the integer contemplated by the statute as the objective thing to which the offense relates, as has been supposed, but that the time of confinement, regardless of ownership or consignment, determines the offense. For instance, the loading of numerous cars might proceed concurrently, and this of stock belonging to different parties and under different consignments, and if not discontinuous or unduly prolonged, the period of lawful confinement on the same train would end at the same time and place, and if carried beyond that time there would be but one offense. *The Baltimore and Ohio Southwestern Railroad Company v. United States*, *Advance Sheets Sup. Ct. of U. S.*, decided March 20, 1911. This was practically what happened in loading at Gazelle, California, and under the decision cited, there would be but two offenses for which the Terminal Company would be liable in the present controversy.

As the Southern Pacific Company has been heretofore prosecuted for its part in the carriage of these cattle beyond the lawful period, the lightest penalty should be imposed here, namely, \$100 in each of said two offenses.

FILED APRIL 28, 1911.

[Cir. 53]

1161 81 700
Issued July 8, 1911.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 54.

GEO. P. McCABE, Solicitor.

NATIONAL FOREST ADMINISTRATIVE ACT.

(Act June 4, 1897; 30 Stat., 11.)

The decision of the Supreme Court of the United States, rendered on May 1, 1911, in the cases entitled "The United States *v.* Pierre Grimaud and J. P. Carajous" and "The United States *v.* Antonio Inda" is of especial interest and importance at this time, in view of the somewhat widespread belief which has prevailed in certain sections of the United States where national forests are situated that the grazing of cattle on, and other uses of, the lands embraced within national forests were public rights and could not be controlled and regulated by the Secretary of Agriculture, even under that provision of the act of June 4, 1897, which provides:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may hereafter be set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to protect the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

The decision sets at rest the long controversy respecting, first, the constitutionality of the act of June 4, 1897, and, second, the validity of the regulations of the Secretary of Agriculture thereunder. Not only have lawyers and laymen disagreed among themselves in respect to these questions, but some of the Federal district courts have also been divided in opinion in regard thereto.

The decision of the Supreme Court is unanimous in sustaining not only the constitutionality of the act of June 4, 1897, but also the validity of the regulation of the Secretary of Agriculture requiring persons who desire to pasture stock on the national forests to secure a permit and pay a fee therefor.

In the opinion of the court, which is published as a part of this circular, will be found concise statements of the facts in both cases which were consolidated for argument and consideration.

The following is the substance of the decision:

1. The act of June 4, 1897 (30 Stat., 11), authorizing the Secretary of Agriculture to make such rules and regulations and establish such service as will insure the objects of the National Forests, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction, and prescribing punishment for any violation of such rules and regulations, does not confer upon the Secretary of Agriculture legislative power, but merely authorizes him to exercise administrative functions in the management of the National Forests, which, because of the various and varying details of such management, cannot be provided in general regulations enacted by Congress, and the Act is constitutional.

2. The authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punishable as a public offense.

3. Although there is no act of Congress which in express terms declares that it shall be unlawful to graze sheep on a National Forest, and although the Act of June 4, 1897, provides that nothing therein shall prohibit any person from entering such reservations for all proper and lawful purposes, such entry and use of the reserves is subject to the proviso, also contained in the Act, that such persons comply with the rules and regulations covering such reservations; and as the Act, not the Secretary of Agriculture, makes it an offense to violate such regulations, the grazing of sheep on the reservations without complying with the regulations of the Secretary of Agriculture, which require that a permit be obtained before grazing sheep on the reservations, is unlawful and an indictable offense.

4. The regulation promulgated by the Secretary of Agriculture on June 12, 1906, providing that "All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers and travelers and milch or work animals, not exceeding a total of six head, owned by *bona fide* settlers residing in or near a forest reserve, which are excepted and require no permit," is valid and enforceable, and a person who drives and grazes sheep upon a National Forest in violation of such regulations is making unlawful use of the Government property and renders himself liable to the penalty imposed by Congress.

5. The Secretary of Agriculture has the power to impose a charge for the privilege of grazing on the National Forests. In addition to the general power conferred by the Act of June 4, 1897, the Act of February 1, 1905, which declares "That all money received from the sale of any products or the use of any land or resources of said forest reserves shall be covered into the Treasury of the United States and for a period of five years from the passage of this act shall constitute a special fund available, until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement, and extension of Federal forest reserves," and also subsequent acts providing that money received from any source of forest reserve revenue shall be covered into the Treasury, and a part thereof turned over to the States and Territories in which the National Forests are located, to be expended for public schools and roads, clearly indicate that Congress intended that the Secretary of Agriculture might make charges out of which a revenue from forest reserves was expected to arise.

The following is the opinion of the Court:

SUPREME COURT OF THE UNITED STATES.

Nos. 241, 242.—OCTOBER TERM, 1910.

<p>The United States, Plaintiff in Error, 241 vs. Pierre Grimaud and J. P. Carajous,</p>	}	<p>In error to the District Court of the United States for the Southern Dis- trict of California.</p>
<p>The United States, Plaintiff in Error, 242 vs. Antonio Inda.</p>	}	

[May 1, 1911.]

By the act of March 3, 1891, (26 Stat. 1103), the President was authorized, from time to time, to set apart and reserve, in any Sate or Territory, public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public forest reservations. And by the act of June 4, 1897 (30 Stat. L. 35), the purposes of these reservations were declared to be "to improve and protect the forest within the reservation, and to secure favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." . . . "All water on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder." (30 Stat. 36.)

It is also provided that nothing in the act "should be construed as prohibiting the egress and ingress of actual settlers residing within the boundaries of such reservation," . . . nor shall anything herein . . . prohibit any person from entering upon such forest reservation for all proper and lawful purposes, . . . provided that such persons comply with the rules and regulations covering such forest reservation."

There were special provisions as to the sale of timber from any reserve (except those in the State of California, 30 Stat. 35; 31 Stat. 661,) and a requirement that the proceeds thereof and from any other forest source should be covered into the Treasury, the act of February 1st, 1905, (33 Stat. 628,) providing that "all money received from the sale of any products or the use of any land or resources of said forest reserve shall be covered into the Treasury of the United States for a period of five years from the passage of this act, shall constitute a special fund available, until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement and extension of Federal Forest Reserves."

The act of 1905 as to receipts arising from the sale of any products or the use of any land was, in some respects, modified by the act of March 4, 1907. It provided that all moneys received after July 1, 1907, by or on account of forest service timber; or from any other source of forest reservation revenue, shall be covered into the Treasury, "provided that ten per cent of all money received from each forest reserve during any fiscal year, including the year ending June 30, 1906, shall be paid at the end thereof by the Secretary of the Treasury to the State or Territory in which said reserve is situated. to be expended, as the State or Territorial legislature may prescribe, for the benefit of the public schools and public roads in the county or counties in which the forest reserve is situated." 34 Stat. 1270.

The jurisdiction, both civil and criminal, over persons within such reservation was not to be affected by the establishment thereof "except so far as the punishment of offenses against the United States herein is concerned; the intent being that the State shall not by reason of the establishment of the reserve lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duty as citizens of the State."

The original act provided that the management and regulation of these reserves should be by the Secretary of the Interior, but in 1905 that power was conferred upon the Secretary of Agriculture, (33 Stat. L. 628,) and by virtue of those various statutes he was authorized to "make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations . . . ; and he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as prescribed in Rev. Stat. 5388," which, as amended, provides for a fine of not more than five hundred dollars and imprisonment for not more than twelve months or both, at the discretion of the court. 26 Stat. 1103; 30 Stat. 34; 30 Stat. 35; 31 Stat. 661; 33 Stat. 36; 7 Fed. Stat. Anno. 310-317, 296, Supp. 1909, p. 634.

Under these acts the Secretary of Agriculture, on June 12, 1906, promulgated and established certain rules for the purpose of regulating the use and occupancy of the public forest reservations and preserving the forests thereon from destruction, and among those established was the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers and travelers and milch or work animals, not exceeding a total of six head, owned by *bona fide* settlers residing in or near a forest reserve, which are excepted and require no permit."

The defendants were charged with driving and grazing sheep on a reserve, without a permit. The grand jury in the District Court for the Southern District of California, at the November term, 1907, indicted Pierre Grimaud and J. P. Carajous, charging that on April 26, 1907, after the Sierra Forest Reserve had been established, and after regulation 45 had been promulgated, "they did knowingly, wilfully and unlawfully pasture and graze and cause and procure to be pastured and grazed certain sheep (the exact number being to the grand jurors unknown) upon certain land within the limits of and a part of said Sierra Forest Reserve, without having theretofore or at any time secured or obtained a permit or any permission for said pasturing or grazing of said sheep or any part of them, as required by the said rules and regulations of the Secretary of Agriculture," the said sheep not being within any of the excepted classes. The indictment concluded, "contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States."

The defendants demurred, upon the ground (1) that the facts stated did not constitute a public offense, or a public offense against the United States, and (2) that the acts of Congress making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture are unconstitutional, in that they are an attempt by Congress to delegate its legislative power to an administrative officer." The court sustained the demurrers, (170 Fed. 205,) and made a like ruling on the similar indictment in *U. S. v. Inda*, 216 U. S. 614. Both judgments were affirmed by a divided court. Afterwards petitions for rehearing were granted.

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the Court.

The defendants were indicted for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by the regulations adopted by the Secretary of Agriculture. They demurred on the ground that the Forest Reserve Act of 1891 was unconstitutional, in so far as it delegated to the Secretary of Agriculture power to make rules and regulations and made a violation thereof a penal offense. Their several demurrers were sustained. The Government brought the case here under that clause of the Criminal Appeals Act (34 Stat. 1246), which allows a writ of error where the "decision complained of was based upon the invalidity of the statute."

The Federal courts have been divided on the question as to whether violations of those regulations of the Secretary of Agriculture constitute a crime. The rules were held to be valid for civil purposes in *Dastervignes v. United States*, 122 Fed. 30; *United States v. Dastervignes*, 118 Fed. 199; *United States v. Shannon*, 151 Fed. 863; *Ibid.* 160 Fed. 870. They were also sustained in criminal prosecutions in *United States v. Deguirro*, 152 Fed. 568; *United States v. Domingo*, 152 Fed. 566; *United States v. Bale*, 156 Fed. 687; *United States v. Rizzinelli*, 182 Fed. 675. But the regulations were held to be invalid in *United States v. Blasingame*, 116 Fed. 654; *United States v. Matthews*, 146 Fed. 306; *United States v. Dent*, 8 Ariz. 138.

From the various acts relating to the establishment and management of forest reservations it appears that they were intended "to improve and protect the forest and to secure favorable conditions of water flows." It was declared that the acts should not be "construed to prohibit the egress and ingress of actual settlers" residing therein nor "to prohibit any person from entering the reservation for all proper and lawful purposes, including prospecting, and locating and developing mineral resources; provided that such persons comply with the rules and regulations covering such forest reservation." (Act of 1897, 30 Stat. 36.) It was also declared that the Secretary "may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished" as is provided in Sec. 5388 of the Revised Statutes, as amended.

Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another.

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws, ordinances and

regulations for the government of towns and cities. Such ordinances do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes nor fix penalties therefor.

By whatever name they are called they refer to matters of local management and local police. *Brodline v. Revere*, 182 Mass. 599. They are "not of legislative character in the highest sense of the term; and as an owner may delegate to his principal agent the right to employ subordinates, giving them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature [authorities] the determination of minor matters." *Butte City Water Co. v. Baker*, 165 U. S. 126.

It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 42, where he was considering the authority of courts to make rules. He there said: "It will not be contended that Congress can delegate to the courts, or to any other tribunal, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." What were these non-legislative powers which Congress *could* exercise but which might also be delegated to others was not determined, for he said: "The line has not been exactly drawn which separates those important subjects which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provision to fill up the details."

From the 'beginning' of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

Thus it is unlawful to charge unreasonable rates or to discriminate between shippers, and the Interstate Commerce Commission has been given authority to make reasonable rates and to administer the law against discrimination. *Int. Com. Com. v. Ill. Cent. R. R.*, 215 U. S. 452; *Int. Com. Com. v. Chicago, Rock Island, &c., R. R.*, 218 U. S. 88. Congress provided that after a given date only cars with drawbars of uniform height should be used in interstate commerce, and then constitutionally left to the Commission the administrative duty of fixing a uniform standard. *Saint Louis & Iron Mountain R. R. v. Taylor*, 210 U. S. 287. In *Union Bridge Co. v. United States*, 204 U. S. 364; *In re Kollock*, 165 U. S. 526; *Butterfield v. Stranahan*, 192 U. S. 470, it appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules was then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside of the circle of

that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect.

The defendants rely on *United States v. Eaton*, 144 U. S. 677, where the act authorized the Commissioner to make rules for carrying the statute into effect, but imposed no penalty for failing to observe his regulations. Another section (5) required that the dealer should keep books showing certain facts, and providing that he should conduct his business under such surveillance of officers as the Commissioner might by regulation require. Another section declared that if any dealer should knowingly omit to do any of the things "required by law" he should pay a penalty of a thousand dollars. Eaton failed to keep the books required by the regulations. But there was no charge that he omitted "anything required by law," unless it could be held that the books called for by the regulations were "required by law." The court construed the act as a whole and proceeded on the theory that while a violation of the regulations might have been punished as an offense if Congress had so enacted, it had, in fact, made no such provision so far as concerned the particular charge then under consideration. Congress required the dealer to keep books rendering return of materials and products, but imposed no penalty for failing so to do. The Commissioner went much further and required the dealer to keep books showing oleomargarine received, from whom received and to whom the same was sold. It was sought to punish the defendant for failing to keep the books required by the regulations. Manifestly this was putting the regulations above the statute. The court showed that when Congress enacted that a certain sort of book should be kept, the Commissioner could not go further and require additional books; or, if he did make such regulation, there was no provision in the statute by which a failure to comply therewith could be punished. It said that, "if Congress intended to make it an offense for wholesale dealers to omit to keep books and render returns required by regulations of the Commissioner, it would have done so distinctly"—implying that if it had done so distinctly the violation of the regulations would have been an offense.

But the very thing which was omitted in the oleomargarine act has been distinctly done in the Forest Reserve act, which, in terms, provides that "any violation of the provisions of this act or such rules and regulations of the Secretary shall be punished as prescribed in section 5388 of the Revised Statutes as amended."

In *Union Bridge Co. v. United States*, 204 U. S. 386, Justice Harlan, speaking for the court, said:

"By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with the declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

And again he said in *Field v. Clark*, 143 U. S. 694:

"The legislature cannot delegate its power to make law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would

be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power and must therefore be a subject of inquiry and determination outside of the halls of legislation." See also *Coha v. United States*, 152 U. S. 211; *United States v. Bailey*, 9 Pet. 238; *Cosmos Co. v. Gray Eagle Co.*, 190 U. S. 309; *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 333; *Roughton v. Knight*, October Term, 1910; *Smith v. Whitney*, 116 U. S. 167; *Ex parte Reed*, 100 U. S. 22; *Gratiot v. United States*, 4 How. 81.

In *Brodbyne v. Revere*, 182 Mass. 599, a boulevard and park board was given authority to make rules and regulations for the control and government of the roadways under its care. It was there held that the provision in the act that breaches of the rules thus made should be breaches of the peace, punishable in any court having jurisdiction, was not a delegation of legislative power which was unconstitutional. The court called attention to the fact that the punishment was not fixed by the board, saying that the making of the rules was administrative, while the substantive legislation was in the statute which provided that they should be punished as breaches of the peace.

That "Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U. S. 692. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes, from which we have quoted, declare, that the privilege of using reserves for "all proper and lawful purposes" is subject to the proviso that the person so using them shall comply "with the rules and regulations covering said forest reservation." The same act makes it an offense to violate those regulations, that is, to use them otherwise than in accordance with the rules established by the Secretary. Thus the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle, mentioned in *Buford v. Houtz*, 133 U. S. 326, was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations. *Wilcox v. Jackson*, 13 Pet. 513.

If, after the passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations, they were making an unlawful use of the Government's property. In doing so they thereby made themselves liable to the penalty imposed by Congress.

It was argued that, even if the Secretary could establish regulations under which a permit was required, there was nothing in the act to indicate that Congress had intended or authorized him to charge for the privilege of grazing sheep on the reserve. These fees were fixed to prevent excessive grazing and thereby protect the young growth, and native grasses, from destruction, and to make a slight income with which to meet the expenses of management. In addition to the general power in the Act of 1897, already quoted, the Act of February 1st, 1905, clearly indicates that the Secretary was authorized to make charges out of which a revenue from forest resources was expected to arise. For it declares that "all money received from the sale of any products or the use of any land or resources of said forest reserve" shall be covered into the Treasury and be applied toward the payment of forest expenses. This act was passed before the promulgation of regulation 45, set out in the indictment.

Subsequent acts also provide that money received from "any source of forest reservation revenue" should be covered into the Treasury, and a part thereof was to be turned over to the Treasurers of the respective States to be expended for the benefit of the public schools and public roads in the counties in which the forest reserves are situated. (34 Stat. 684, 1270.)

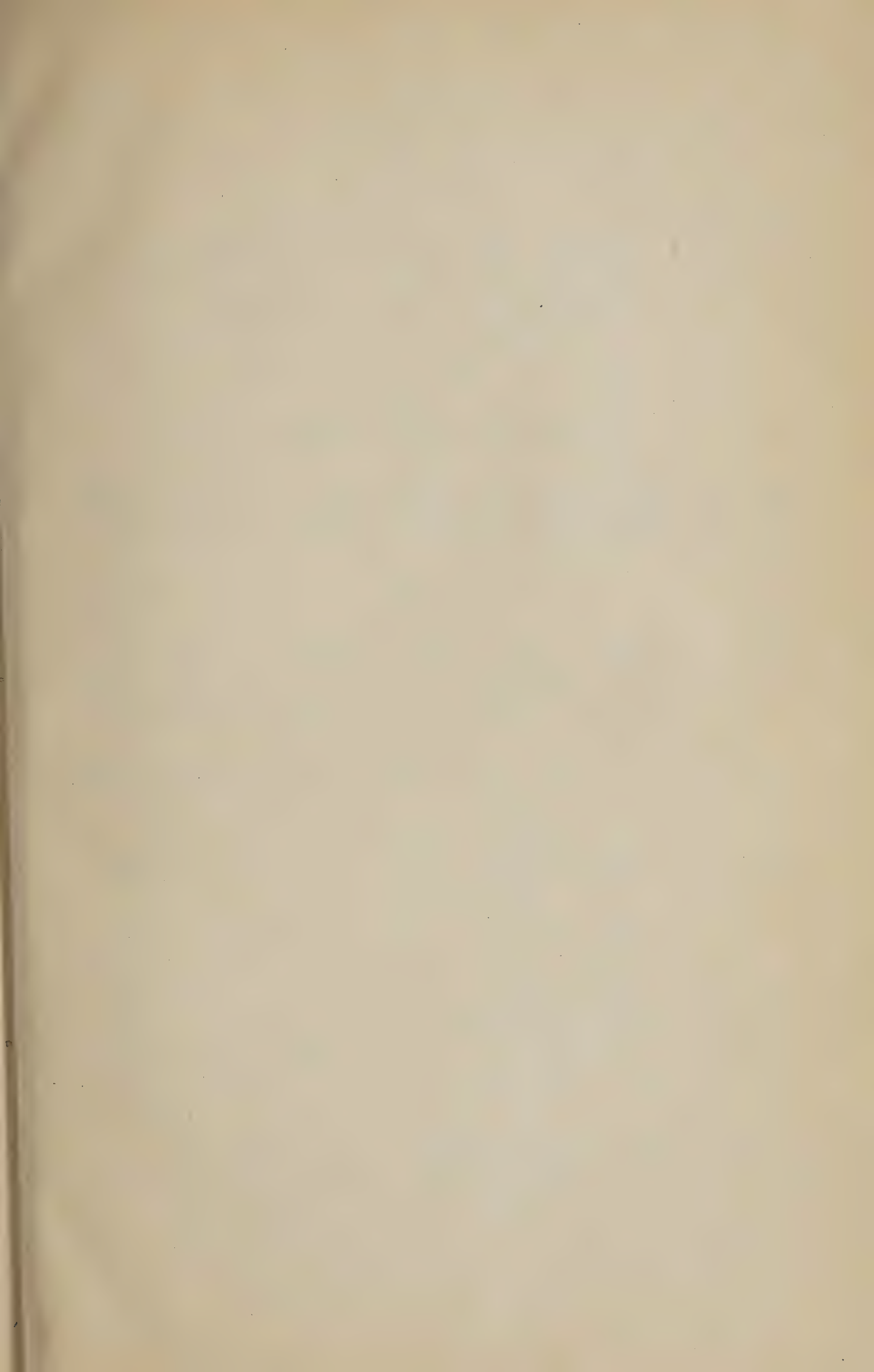
The Secretary of Agriculture could not make rules and regulations for any and every purpose. *Williamson v. United States* 207, U. S. 462. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

The indictment charges, and the demurrer, admits that Rule 45 was promulgated for the purpose of regulating the occupancy and use of the public forest reservation and preserving the forest. The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes, "contrary to the laws of the United States and the peace and dignity thereof." The demurrers should have been overruled. The affirmances by a divided court heretofore entered are set aside and the judgments in both cases

Reversed.

[Cir. 54]





RECEIVED
AUG 25 1911
Department of Agriculture

Issued August 1, 1911.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 55.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Court of Appeals for the Second Circuit Overruling Claimant's Exceptions to Libel for Condemnation and Forfeiture under Section 10 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768).

SYLLABUS.¹

In proceedings for confiscation under section 10 of the Food and Drugs Act it is unnecessary to allege in libels that adulterated foods which after transportation from one State to another remain unloaded, unsold, or in original unbroken packages were transported for sale.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

UNITED STATES OF AMERICA, *Libellant-Appellant*,

v.

THREE HUNDRED CANS OF FROZEN EGGS, EUROPEAN EGG COMPANY,
Claimant-Appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge, delivered the opinion of the court.

This is a libel filed by the United States for the condemnation of 300 cases of frozen eggs under sec. 10 of the Food and Drugs Act of June 30, 1906, 34 Stat. L. 768. The material allegations are as follows:

"1. This libel is filed by the United States of America in its own right, and prays seizure for condemnation of certain articles of food as hereinafter particularly set forth in accordance with the Food and Drugs Act of Congress, approved June 30, 1906, 34 Stat., 768.

"2. Your libellant represents to the Court, that in the City, County and Southern District of New York, and within the jurisdiction of

¹ Not by the court.

this Honorable Court there are owned by the European Egg Company and stored at the Harrison Street Cold Storage Warehouse, Number 7 Harrison Street, Borough of Manhattan, City of New York, 300 cans each containing an article of food, to wit, frozen eggs, each weighing approximately 28 pounds.

"3. Your libellant further represents that said articles of food so as aforesaid particularly described are illegally held within the jurisdiction of this Honorable Court and are liable to condemnation and confiscation, as provided in the said Act of Congress:

"In that each of the said 300 cans contains an article of food, to wit, frozen eggs, which, being animal substance, is in whole or in part filthy, putrid and decomposed, contrary to the provisions of subdivision 6 of Section 7 of the Act of June 30, 1906.

"Your libellant further represents that the said articles were shipped from South Omaha, Nebraska, by the European Egg Company, on or about the 3d day of October, 1910, via the Chicago, Burlington and Quincy Railroad Company, the Chicago, Indiana and Southern Railroad Company, and the Erie Despatch, and were thereafter transported and delivered to said European Egg Company at the Harrison Street Cold Storage Warehouse, number 7 Harrison Street, at the Borough of Manhattan, in the City of New York, on or about the 8th day of October, 1910, and that the said articles remain unsold in their original unbroken packages in the said City, County and State of New York and in the Southern District of New York."

The European Egg Company, claimant, filed exceptions to the libel as follows:

"First Exception.—That this Honorable Court has no jurisdiction of the matters contained in said libel, the same not being matters that come under the Food and Drug Act of Congress, approved June 30th, 1906.

"Second Exception.—For that the said libellant has not well and sufficiently set forth evidence to warrant the issuance of said libel, in so far as it does not state that said frozen eggs were seized while being used in Inter-State Commerce."

The District Judge sustained the exceptions to the libel, saying:

"I think that *Hipolite Egg Co. v. United States* covers this case if the eggs had been alleged to have been shipped 'for sale.' The statute, Sec. 10, says 'transported * * * for sale,' and the libel does not follow the statute, though it does say that they remain unsold. That is hardly enough. It is not necessary to consider the power of Congress if the transportation was not for sale, but for aught that appears these eggs were not to be sold either as eggs or in any other form. Therefore the libellant must amend. Exceptions sustained."

The United States having failed to amend the libel, it was dismissed and this appeal taken from the decree.

We think the learned judge erred in treating the charge in the libel as against the cases while being transported. The second exception seems to proceed on this ground. The Act expressly describes the

guilty goods in such a case as "being transported * * * for sale." But the charge was against the goods in the original packages after transportation was over. The applicable words of the Act are "or having been transported remains unloaded, unsold or in original unbroken packages." The allegations as to the carriage of the goods between Nebraska and New York were made for the purpose of showing that they were a subject of interstate commerce.

It would be a very natural construction to hold that the words "for sale" describing the goods seized in course of transportation are to be carried forward to the goods in the next category seized after transportation is over as the claimant contends under the first exception. Indeed, this was the construction adopted by Sater, J. in *United States v. 46 Bags of Sugar*, 183 Fed Rep. 642. But the decision of the Supreme Court in *Hipolite Egg Co., Claimant of 500 Cases of Preserved Eggs v. United States*, decided March 13, 1911 makes this construction impossible. The opinion of Mr. Justice McKenna and the transcript of record in that case shows that Thomas & Clarke (for whom the Hipolite Egg Company was substituted as claimant) were the owners of 370 cases of "preserved whole eggs" in a cold storage warehouse at St. Louis, Missouri, which they had previously bought from the Hipolite Egg Company of that city: that Thomas & Clarke shipped 50 cases of these eggs from St. Louis to themselves at Peoria, Illinois, to be used in their business as manufacturing bakers which were the cans seized in the original packages on their premises after the transportation was over. The charge in the libel was:

"That the said fifty cans, more or less, containing said food product and so adulterated as above set forth, have been transported from the City of St. Louis, in the State of Missouri, to the City of Peoria, in the State of Illinois, in the Division and District aforesaid, and remain unsold in this District in the original and unbroken package, in the possession of Thomas and Clarke, in the City of Peoria, in violation of the said Act approved June 30, 1906."

Although the District Judge found that the eggs were not transported for sale, but for use by the consignees in their business, he entered a decree of condemnation which the Supreme Court affirmed. The case is precisely similar to the one under consideration. Mr. Justice McKenna states the claimant's contention as follows:

"(1) Sec. 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale but which has been shipped solely for use as raw material in the manufacture of some other product."

He then goes on to say after considering Judge Sater's opinion, *supra*:

"The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to

Cowan

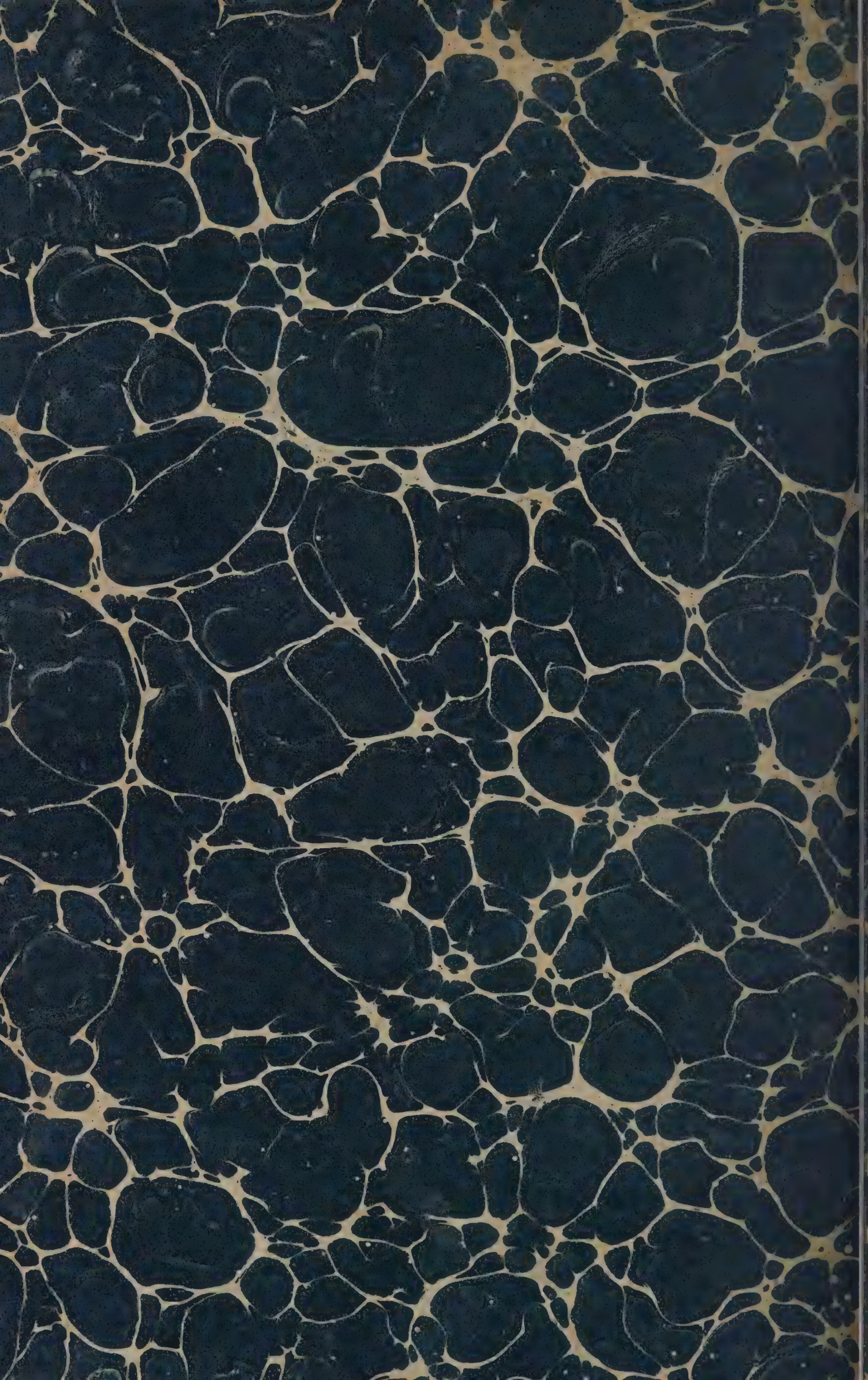
condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold or in original unbroken packages. These situations are clearly separate, and we cannot unite or qualify them by the purpose of the owner to be a sale. It, indeed, may be asked in what manner a sale? The question suggests that we might accept the condition, and yet the instances of this record be within the statute. All articles, compound or single, not intended for consumption by the producer, are designed for sale, and, because they are, it is the concern of the law to have them pure.

"It is, however, insisted that 'the proceedings *in personam* authorized by the law was intended to, and no doubt is, capable of giving full force and effect to the law'; and, further, that a producer in a State is not interested in an article shipped from another State which is not intended to be sold or offered for consumption until it is manufactured into something else. The argument is peculiar. It is certainly to the interest of a producer or consumer that the article which he receives, no matter whence it come, shall be pure, and the law seeks to secure that interest, not only through personal penalties but through the condemnation of the article if impure. There is nothing inconsistent in the remedies, nor are they dependent." *The Three Friends*, 166 U. S. 1, 49.

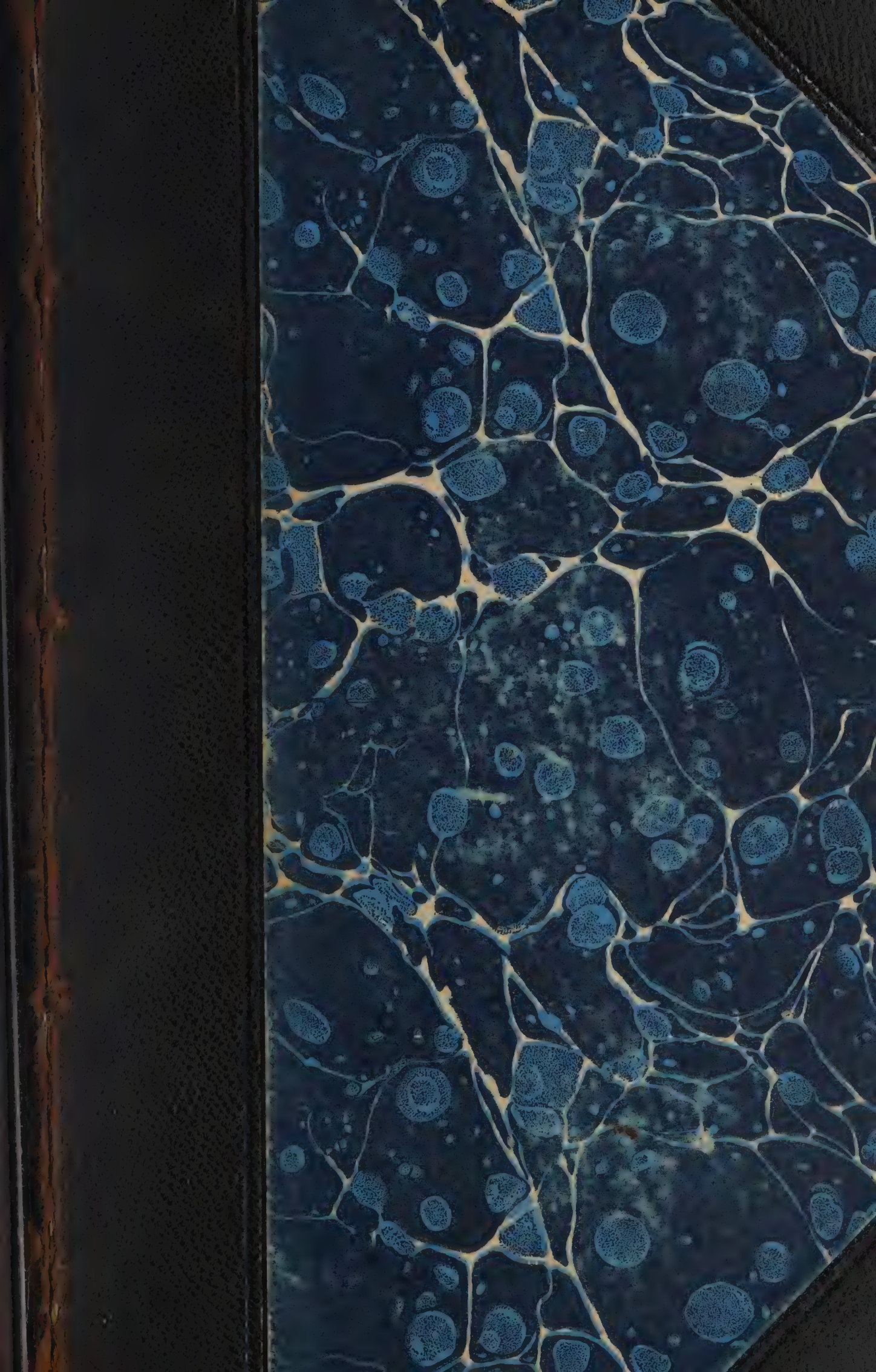
The District Judge dismissed the libel because it did not describe the goods as transported "for sale", whereas this exception should have been overruled. Willard, J. has come to conclusions similar to ours in *United States v. Two Barrels of Desiccated Eggs*, 185 F. R. 302, 307.

It was further suggested at the hearing that these eggs might have been intended for other uses than food uses and that the libel should have alleged that they were to be used for food purposes. It does describe the goods as articles of food and this is quite sufficient to withstand these general exceptions.

Finally, it is said that as the Egg Company shipped to itself, without sale, the packages were never a part of interstate commerce. We know of no authority for such a proposition. Certainly the case of *Hipolite Egg Company* is not such. The decree is reversed.



[illegible][illegible]



Res. set
LIBRARY

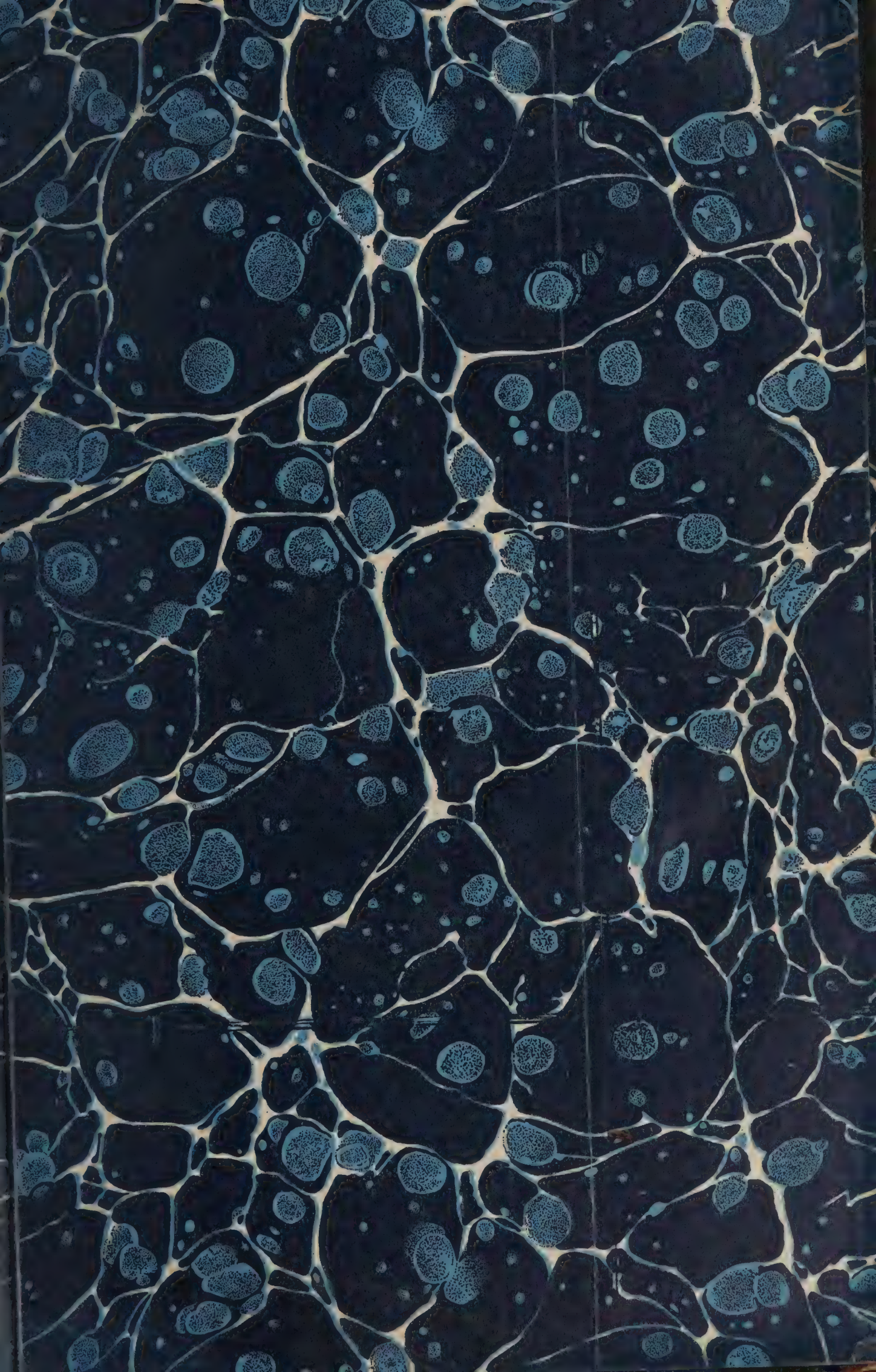
OF THE

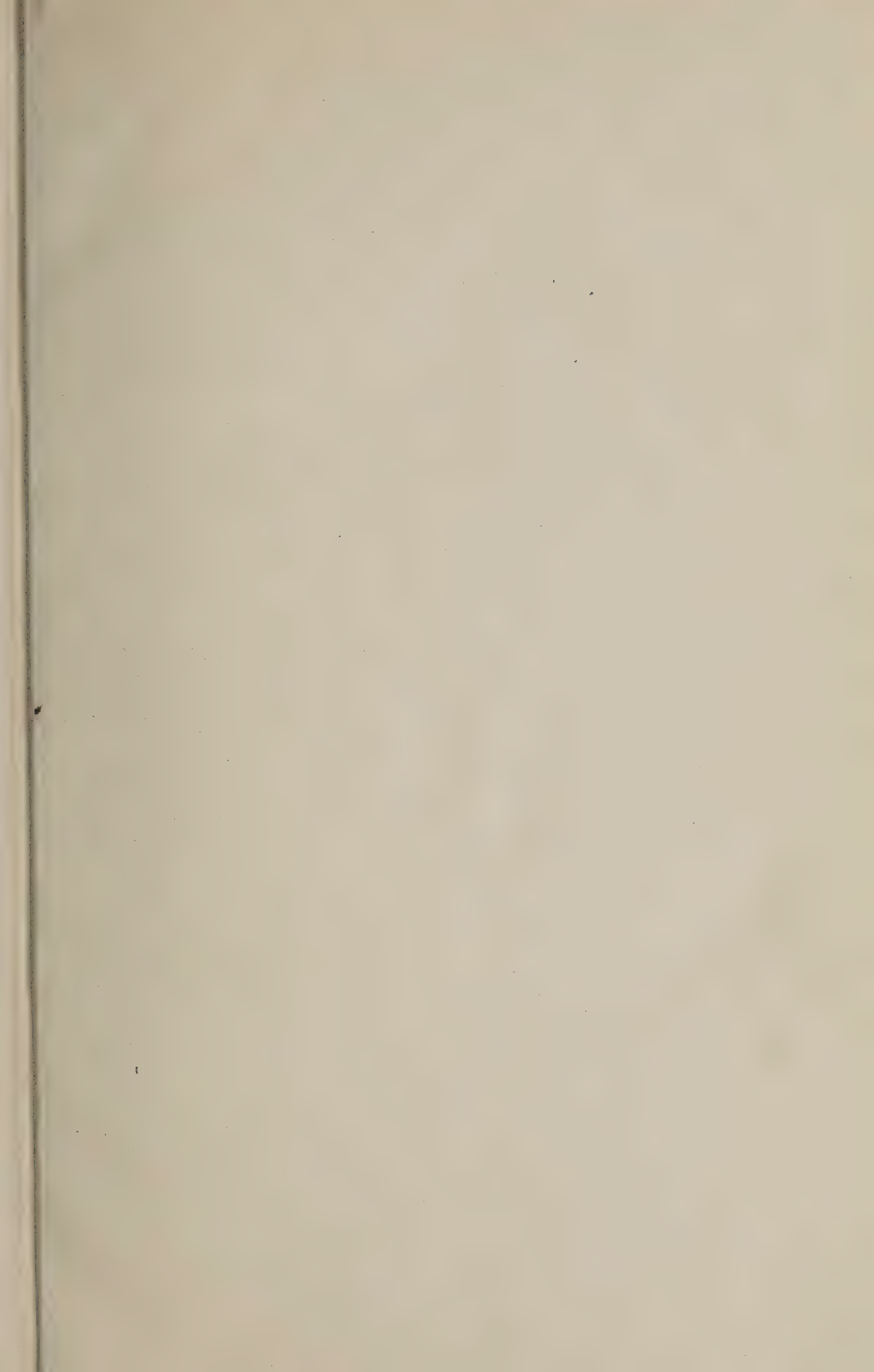
UNITED STATES
DEPARTMENT OF AGRICULTURE

Class 1
603500

Book So 45 C
no. 56-91

8-1577





045C
United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 56. 29

GEO. P. McCABE, Solicitor.

MEAT INSPECTION LAW.

LARD SUBSTITUTE COMPOSED OF VEGETABLE OILS AND IMPORTED
OLEO STEARIN.

DEPARTMENT OF JUSTICE,
Washington, D. C., August 26, 1911.

THE SECRETARY OF AGRICULTURE.

SIR: I beg to acknowledge the receipt of your letter of the 14th instant, in which you submit for my opinion the following question:

Does the Meat Inspection Amendment (Act of June 30, 1906, 34 Stat., 674) prohibit the transportation in interstate commerce of lard substitute, a compound of vegetable oils and of a definite and considerable quantity of imported oleo stearin, usually in the proportion of 80 per cent of the former, and 20 per cent of the latter?

On July 22, 1910, (28 Op. A. G. 369) Acting Attorney General Fowler rendered you an opinion to the effect that factories, where lard substitute was made, and the article itself, were subject to inspection, under the above act, where the oleo stearin contained therein was of domestic manufacture. From this opinion it follows, that the transportation interstate of lard substitute, made of domestic oleo stearin, is prohibited under the provisions of the said act, unless so inspected. The difference between the question now put and that on which Mr. Fowler's opinion was predicated is this: the present question assumes that the oleo stearin entering into the composition of the lard substitute is, not of domestic, but of foreign origin, and imported into this country as oleo stearin; and, I take it for granted, your question further assumes, though it does not expressly state, that the establishment where the product is made, and the product itself, have not been inspected under the above act.

The general purpose of the Act of June 30, 1906, is stated in its opening language, to be that, "of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food." The act is a comprehensive body of remedial legislation, passed to accomplish a great object, and its particular provisions should receive a liberal construction, so as, not to hamper,

but to carry out its beneficent design. It is evident that factories where lard substitute is made from *imported* oleo stearin, and the lard substitute itself so made, are as much within the "purpose" of the act, as above quoted, and are as likely to endanger the public health, as factories where the lard substitute is made from *domestic* stearin, or the lard substitute itself so made. A construction which would exclude one from the operation of the act, but include the other, should not be made, unless the language of the act compels it.

The portion of the act relating to the inspection of meat food products, (which term includes "lard substitute") is the so-called paragraph 4, and reads:

"that for the purposes hereinbefore set forth" (that is for the purpose of preventing the use in interstate commerce of unwholesome meat food products) "the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of *all* meat food products prepared for interstate or foreign commerce in *any* slaughtering, meat canning, salting, packing, rendering, or similar establishment . . . ; and said inspectors shall mark, stamp, tag, or label as "inspected and passed" *all such* products found to be sound, healthful, and wholesome, and which contain no dyes, chemical, preservative, or ingredients which render such meat or meat food products, unsound, unwholesome or unfit for human food; . . ." (The italics are mine.)

A similar provision is then made for the reverse case. This language is unqualified. It applies, by its terms, not simply to meat food products manufactured from domestic or inspected meat or meat products, but to *all* meat food products. The point aimed at by this language is, not whether such products be made from imported or domestic meat or meat constituents, but whether, as the "purpose" of the act foreshadowed, such products be "unsound, unhealthful, unwholesome, or unfit for human food." What reason can be given for limiting the language so as to exclude a case clearly within the evil for the correction of which the act was passed?

It is claimed that, looking to all the provisions of the act, the "meat food products," spoken of therein, are those, and those only, which are produced from cattle, sheep &c., subject to inspection under the act. This construction, however, while possible, is too narrow and technical for such a broad statute, having such a large design. A much better construction, because more in accordance with the spirit and general intent of the legislation, is, that the qualifying words "thereof" and "therefrom" attached to the term "meat food products" in the act refer merely to the kind of animals from which the meat food products are made, and not to the origin or previous experience of such animals. Also it must be noticed that the word "thereof" is not contained in the paragraph 4 quoted above. In my judgment, therefore, the language of this act is broad enough to include "meat food products," e. g. lard substitute, which

are made from an imported meat constituent, e. g. oleo stearin, with the added "ingredient" of a vegetable oil; and such lard substitute is therefore subject to inspection under the terms of the act.

The provisions of the act in relation to the inspection of "establishments" where meat food products are prepared, viz. paragraphs 6 and 19, have already been fully examined in the former opinion above referred to. In my judgment those provisions cover all "establishments" where meat food products are prepared, wherever the meat which goes into them may have come from. The act cannot be confined to an inspection only of those "establishments" where the entire process is carried on from slaughtering the cattle to turning out the finished product. It applies also to any "establishment" where any one of the steps towards the final result is taken; and, above all, it applies to all "establishments" where the finished product, the thing which is ready for consumption by the public, is prepared.

If then, lard substitute, composed of imported oleo stearin, and vegetable oil, is subject to inspection under the act of June 30, 1906, together with the "establishment" where it is made, it follows, necessarily, that it is prohibited from interstate transportation under paragraph 8 of the act, and from sale, under paragraph 17 of the act, unless, in its manufacture, the provisions of the act are complied with, and your question must be answered in the affirmative.

It is claimed that this view of the operation of the act is contrary to the opinion of Mr. Moody, rendered you September 27, 1906; (26 Op. A. G. 50). Mr. Moody there held that the prohibition upon interstate transportation, to which you refer, contained in the Act of June 30, 1906, did not apply to meat and meat food products imported from foreign countries. Therefore it follows, from that opinion, that oleo stearin imported from a foreign country is not within the scope of the provisions of this act. It does not, however, in the least, follow that where such oleo stearin is, in fact, transported in interstate commerce, sold to a manufacturer, and by him, in his "establishment", converted into lard substitute, an admitted meat food product, the act does not apply to such manufacture and to the product thereby resulting. Assume that the act only applies to domestic slaughtering, rendering, and manufacture. Still, the lard substitute produced in the way outlined above, is a domestic meat food product, no matter where its constituents may have come from. It is the "establishment" where *it* is made, which is subject to inspection under the act, not the factory where its imported constituents were made; and it is the *lard substitute*, so produced in a domestic "establishment" which is subject to inspection under the act and not *oleo stearin*, its imported constituent. This opinion, therefore, does not trench, in the least, on that of Mr. Moody. Nor is it perceived

how the adoption of the opinion herein stated would have the effect to prevent the use of imported oleo stearin in the manufacture of lard substitute. An inspection of the oleo stearin at the port of entry is not contemplated. It may be imported and sold as freely as before, and it may be used, as before, in the manufacture of lard substitute, provided only the manufacturer of such lard substitute complies with the provisions of the Act of June 30, 1906.

Respectfully,

[Signed]

GEO. W. WICKERSHAM,
Attorney General.

[Cir. 56]



Issued January 8, 1912.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 57.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the United States Circuit Court of Appeals for the Second Circuit, affirming judgment of conviction in a prosecution arising under Section 2 of the Food and Drugs Act of June 30, 1906 (34 Stat., 768).

SYLLABUS.¹

Where a jury brings in a general verdict of guilty upon an information in three counts charging in separate counts different phases of one offense conviction is properly had on any one count.

Refusal of the court to compel election between two counts of an information filed under the food and drugs act, one alleging misbranding of the article as a food, the other alleging misbranding of same as a drug, was not error where there was conflicting evidence as to whether the article in question, which was manifestly an article of food or drink, came within the definition of drug as that word is defined in the act. This question was properly left to the jury. Misbranding of the contents of the bottle containing an article, whether a food or a drug, was an offense under the act and election under the circumstances might have defeated the ends of justice.

The verdict of a jury is conclusive as to the presence of damiana where the testimony of the analyst that he could find no trace of said substance in the product and the testimony of the party who stated he had compounded the liquid in question and that it contained a small amount of damiana leaves was submitted to the jury under the instruction to the effect that the testimony of experts is not binding upon the jury and that they could find such conclusions of fact as they chose.

A guaranty given four days before the trial of a case and 18 months after a prosecution thereunder had been instituted does not satisfy the requirements of a valid guaranty under section 9 of the food and drugs act and will not relieve the defendant charged with the interstate shipment of a misbranded article from liability for such shipment. Such guaranty to be valid must relate to the purchase of the article and must be such that the guarantor can be convicted of the offense, namely, the shipment of the misbranded article. This could not be done unless the guaranty was given before the offense was committed.

¹ Not by the court.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

STEINHARDT BROTHERS & COMPANY,	}
plaintiff in error,	
<i>v.</i>	
UNITED STATES, DEFENDANT IN	
error.	

Before LACOMBE, COXE, and NOYES, circuit judges.

This cause comes here upon a writ of error to review a judgment of the circuit court, Southern District of New York, convicting plaintiff in error, a corporation of violation of the provisions of the Food and Drugs Act of June 30th, 1906. The offense was the shipment to a person in Massachusetts of a bottle containing a liquid, and bearing a label, which described the contents as "Damiana—Nerve Invigorator" and did not state that it contained any alcohol although it did in fact when analyzed indicate the presence of alcohol in excess of 20 per cent.

LACOMBE, *C. J.*

There are three counts. The jury brought in a general verdict of guilty. The act complained of was a single one; the counts presented different phases of it. The sentence was for a single offence. Therefore if we find that conviction was properly had on any one count—the third for instance—the sentence was proper and the judgment should be affirmed.

We do not understand that it is contended that the third count is in any way defective either in form or substance. It charges the shipment of a certain food or drink contained in a bottle, the label of which bore a statement or design regarding the ingredients or substances contained therein, which was false and misleading in that said label contained the words "Damiana Royal Brand Celebrated Nerve Invigorator", which said words were false and misleading in that damiana was not one of the ingredients contained in said bottle.

Error is assigned to the refusal of the court to require the prosecution to elect between the second and third counts; the second count charged misbranding of the article shipped, alleging it to be a "Drug". Upon the proof the bottle manifestly contained a "food or drink" unless its contents were shown to be a "Drug" as that word is defined in the Act. There was conflicting evidence as to whether or not it came within that definition, and that question was left to the jury. There was no error in denying the motion to require an election. Misbranding the bottle which contained the liquid was an offence against the Act whether such liquid was a drink or a drug. Election under such circumstances might have defeated the ends of justice.

This misbranding charged under the third count consisting in labeling the bottle "Damiana—Invigorator" when damiana was not one of the ingredients contained in the bottle. It is contended that there was a failure of proof by the Government of the alleged absence of damiana. The Government chemist who analyzed the contents testified that he could not find any trace of damiana in the compound. A man who said he was the person who compounded the liquid testified that it contained a small amount of damiana leaves. The court left it to the jury to say whether in fact there was sufficient damiana in the preparation, so that the label on it, "Damiana," was a proper label, or whether it was not and whether the label was misleading under the meaning of the Act. This part of the charge was not excepted to, but, at defendant's request the court supplemented it with the further instruction that: "The testimony of the experts is not binding upon the jury: that they may disregard such testimony if they choose and find such conclusions of fact as they choose." Under these circumstances the verdict is conclusive as to the absence of damiana.

The Statute contains a section which reads as follows:

"SEC. 9. That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines or other penalties which would attach, in due course, to the dealer under the provision of this act."

Four days before the trial, more than eighteen months after prosecution was initiated defendant obtained the signature of such a guaranty by another corporation known as Deimel Brothers & Company doing a similar business in the same building as defendant. There was some testimony as to business relations between the two corporations, and as to the one holding a controlling interest in the other. The trial judge refused to admit the guaranty in evidence on the express ground that it was dated June 6, 1910, whereas the information was filed November 24th, 1909; such refusal is assigned as error. In our opinion his ruling was correct. If Congress had intended that a dealer could avoid conviction by obtaining a guaranty from the manufacturer after his prosecution had begun, it would presumably have evidenced that intention by providing "no dealer shall be *convicted*," instead of providing that "no dealer shall be *prosecuted*." So too the section provides that he is to have the guaranty signed by the person "from whom he purchases the articles,"

language which seems to imply that guaranty and purchase are related transactions. Moreover the guaranty is to be of such a sort and so given that the guarantor can be himself convicted of the offence. He surely could be if his guaranty had been signed before the shipment of a misbranded article; the shipment being the offence. It would seem that he could not be convicted of the offence of shipment when he did not sign guaranty until long after the offence had been committed. We think the Statute should be construed according to its natural interpretation.

The judgment is affirmed.

[Cir. 57]

○

Issued December 22, 1911.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 58.

GEORGE P. McCABE, Solicitor.

FOOD AND DRUGS ACT.

Decision of the Supreme Court of the United States reversing judgment of the Circuit Court of the United States for the Southern District of New York, in a prosecution under section 2 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768).

SUPREME COURT OF THE UNITED STATES.

No. 462.—OCTOBER TERM, 1911.

THE UNITED STATES, PLAINTIFF IN ERROR.

vs.

JOHN MORGAN AND ALFRED Y. MORGAN.

In error to the Circuit Court of the United States for the Southern District of New York.

[December 11, 1911.]

The defendants maintained an establishment in New York where, after filtering Croton water drawn from the city pipes, adding mineral salts and charging it with carbonic acid, the water was bottled and sold as "Imperial Spring Water." In October, 1908, a food and drug inspector applied to a druggist in Newark, New Jersey, for several bottles of this water. The druggist, not having them in stock, ordered them from the defendants, who shipped them from New York to the druggist in Newark. He delivered them to the inspector, who paid therefor.

The judge, in his opinion, treats the prosecution as having been instituted by the inspector, though this does not affirmatively appear in the record, and the defendants were not indicted until April, 1910, when they were found guilty of shipping misbranded goods in interstate commerce. They moved in arrest of judgment on the ground

that it was not alleged that they had been given notice and a preliminary hearing by the Department of Agriculture, contending this was a condition precedent to the return of a valid indictment. The judge held that such hearing must be granted in all cases where the prosecution was instituted by the Department of Agriculture or its agent (181 Fed. 587), and from a later order sustaining the motion in arrest the Government brought the case here under the Criminal Appeals Act.

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the Court.

The Federal courts have not agreed as to the effect of the provision for notice and hearing found in section 4 of the Pure Food and Drug Act of June 30, 1906 (34 Stat L. 678). *U. S. v. Barrels Olives*, 179 Fed. 984. *U. S. v. Cases of Grape Juice*, 189 Fed. 331. Whether it confers a right upon the defendant, or results in imposing a duty upon the district attorney, can be determined by a brief examination of a few of the provisions of the act.

Under the Pure Food Law not only a manufacturer, but any dealer, shipping adulterated or misbranded goods in interstate commerce is guilty of a misdemeanor. In aid of enforcement of the statute it is made the duty of the Department of Agriculture to collect specimens of such article so shipped, and the Bureau of Chemistry is required to analyze them. But, even if the specimen, on analysis, is found to be adulterated, there is no requirement that the case should be turned over at once to the district attorney, for the reason that the "party from whom the sample was obtained" might be a dealer holding a guaranty from his vendor that the articles were not adulterated. In such case the dealer is not liable to prosecution, but the guarantor (§ 9) is made "amenable to the prosecutions, fines and penalties."

The act, therefore, declares (§ 4) that when, on such examination by the Board of Chemistry, the article is found to be adulterated, "notice shall be given to the party from whom the sample was obtained. Any party so notified shall be given an opportunity to be heard." If it then appears that he has violated the statute, the Secretary of Agriculture is required to certify that fact, together with a copy of the analysis, to the proper district attorney, who (§ 5), *without delay*, must "institute appropriate proceedings," by indictment, or libel for condemnation, or both, as the facts may warrant.

But the act also contemplates (§ 5), that complaints may be made to the district attorney by State health officials. In that class of cases, no doubt because the State agents investigate without giving a hearing, the district attorney is not obliged to prosecute unless such State officers "shall present satisfactory evidence of such violation." But

the very fact that he must do so in that event recognizes that he may begin proceedings against a defendant who has not been given a notice and an opportunity to be heard.

In providing for notice in one case, and permitting prosecutions without it in another, the statute clearly shows that there was no intent to make notice jurisdictional. This view is strengthened by the fact that it contains no reference to giving notice to anyone except "to the party from whom the sample was obtained." And if, on the hearing given him, it appears that he is a dealer holding a guaranty, the act in providing for proceedings against such guarantor contains no suggestion that a new notice shall be given him before an indictment can be submitted to the grand jury.

In cases like the present, or where foreign goods are labeled as of domestic manufacture and vice versa, no scientific examination may be necessary. But usually a chemical analysis will be required to determine whether an article is adulterated. The Bureau of Chemistry is equipped to do that work, so that in practice most prosecutions will be based on reports made by the Department of Agriculture after notice. But the hearing is not judicial. There is no provision for compelling the presence of the party from whom the sample was received; if he voluntarily attends he is not in jeopardy; an adverse finding is not binding against him; and a decision in his favor is not an acquittal which prevents a subsequent hearing before the Department, or a trial in court.

The provision as to the hearing is administrative, creating a condition where the district attorney is compelled to prosecute without delay. When he receives the Secretary's report, he is not to make another and independent examination, but is bound to accept the finding of the Department that the goods are adulterated or misbranded, and that the party from whom they had been obtained held no guaranty. But the fact that the statute compels him to act in one case, does not deprive him of the power voluntarily to proceed in that and every other case under his general powers. If, for any reason, the executive department failed to report violations of this law its neglect would leave untouched the duty of the district attorney to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States." Rev. Stats., §§ 771, 1022. So, an improper finding by the Department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial. For the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service.

Repeals by implication are not favored, and there is certainly no presumption that a law passed in the interest of the public health was to hamper district attorneys, curtail the powers of grand juries or make them, with evidence in hand, halt in their investigation and await the action of the Department. To graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will.

It was argued that the privilege of a preliminary hearing was granted so as to prevent malicious prosecutions. But, had such been its intention, the statute would have required that a hearing should be given to all persons charged with a violation of the act, and not merely to those from whom the sample was received. A further answer is, that as to this and every other offense the Fourth Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an Information unless it is supported by the oath of some one having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors,—the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the Government or prompted by private malice. There is nothing in the nature of the offense under the Pure Food Law, or in the language of the statute, which indicates that Congress intended to grant violators of this act a conditional immunity from prosecution, or to confer upon them a privilege not given every other person charged with a crime. The judgment is

Reversed.

[Cir. 58]

O

★ JAN 22 1912
U.S. DEPT. OF AGRICULTURE

Issued January 20, 1912.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 59.

GEO. P. McCABE, Solicitor.

THE TWENTY-EGHT HOUR LAW.

Decision of the United States Circuit Court of Appeals for the Second Circuit, affirming the decision of the Circuit Court of the United States for the Western District of New York, in a case involving a violation of the Twenty-Eight Hour Law (act of June 29, 1906; 34 Stat., 607).

SYLLABUS.¹

1. In an action for the recovery of the penalty provided for by the act of June 29, 1906 (34 Stat., 607), the trial court did not err in refusing to charge the jury "that no violation of the provisions of this law on the part of the defendant occurred while the cattle were in transportation through Canada."

2. The Twenty-Eight Hour Law is applicable to a shipment originating in one State and ending in another when the deprivation of food, water, and rest for the statutory period is shown, even though part of such period elapsed while the animals were in a foreign country.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

GRAND TRUNK RAILWAY COMPANY OF CANADA,
plaintiff in error (defendant below),

vs.

THE UNITED STATES OF AMERICA, *defendant in*
error (plaintiff below).

Before LACOMBE, COXE, and NOYES, *Circuit Judges*.

On writ of error to the Circuit Court for the Western District of New York to review a judgment against the Grand Trunk Railway for \$532.91, being the amount of a fine of \$500 and costs. The fine was imposed by the court after the jury had rendered a verdict in favor of the United States, finding the defendant guilty of a violation of the so-called "Twenty-eight Hour Law," 34 Statutes at Large, Part 1, page 607.

¹ Not by the court.

JOHN W. RYAN, for Plaintiff in Error.

JOHN LORD O'BRIAN, United States Attorney, for Defendant in Error.

COXE, J.:

The law under which this action was brought provides, in so far as it is applicable to the present issue: That no railroad whose road forms any part of a line of road over which cattle, sheep, swine or other animals shall be conveyed from one state or territory into or through another state or territory shall confine the same in cars for a period longer than twenty-eight consecutive hours without unloading the same, in a humane manner, into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight.

The statute further provides:

"In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours except upon the contingencies hereinbefore stated."

The sheep and calves involved in the present controversy were loaded into a car of the Pere Marquette Railroad at Palms, Michigan, on the 24th of February, 1908, at 11 o'clock in the forenoon. At 3 o'clock in the morning of the next day they arrived at Port Huron, Michigan, and were there delivered to the defendant. The sheep and calves were in a compartment in the same car with cattle, the latter being unloaded at Port Huron, but there was no attempt to unload the former. From Port Huron the defendant transported them through Canada to Black Rock, New York, where it delivered them to the New York Central Railroad Company at 12:01 o'clock on February 26th. They were confined without being unloaded for forty-nine hours and one minute.

When they reached Port Huron, Michigan, and were transferred to the defendant, they had already been sixteen hours *en route* without food, rest or water. This fact was known to the defendant. That the sheep and calves could have been unloaded at Port Huron is demonstrated by the fact that the cattle confined in another section of the same car were unloaded, fed and rested. No valid reason is given for the neglect of the sheep and calves. From Port Huron they were transported through Canada and landed at Black Rock, after being confined without food, rest or water for forty-nine con-

secutive hours. This fact was found by the jury. The defendant knew when it received the sheep and calves that they had been carried sixteen hours without food, water or rest and that it would have to carry them for over thirty additional hours over its own lines before they reached their destination.

It is unnecessary to discuss the evidence bearing upon the contention that the unloading at Port Huron was prevented by a storm and that the testimony fails to show that the animals were not fed and watered at Port Huron. These were questions of fact and were settled in favor of the United States by the jury. Their finding, which was in writing, is as follows:

“We find that the sheep and calves in question were transported from Palms, in the State of Michigan, to Port Huron, and thence by the defendant, the Grand Trunk Railway Company, over the line through Canada into the State of New York, and that such animals were knowingly and wilfully confined in transportation for a period longer than 28 consecutive hours, without unloading the same for rest, water and feed, for at least five consecutive hours, and that the defendant was not prevented from doing so by storm or any of the causes specified in the Act.”

The proposition that the act is inapplicable to a shipment from one state through Canada to another state is not relied on by the defendant, in view of the decision of this court to the contrary in the case of the *United States v. Lehigh Valley Railroad Company*.

The only remaining question is whether the court erred in refusing to charge the jury “that no violation of the provisions of this law on the part of the defendant occurred while the cattle were in transportation through Canada.” The defendant contends that there is no evidence to show that it violated the law in the United States and that its action in confining the animals for a longer period than twenty-eight hours in Canada should not be considered. This contention cannot be maintained. When the defendant brought the animals into the United States they had been for forty-nine hours without food, water or rest, in violation of the statute. When the car entered the United States the acts forbidden by the law had been committed and this situation was continued by the defendant for the period of an hour. In other words, the defendant violated the law and continued the violation while in the United States.

We think the logical conclusion from our decision in the *Lehigh Valley* case is that the law is applicable to a shipment originating in one state and ending in another when the deprivation of food, water and rest for the statutory period is shown, even though part of such period elapsed while the animals were in a foreign country.

The refusal to charge as requested was not error. Had the charge been made, it might have misled the jury, although if the facts had been that the defendant had parted with the possession of the animals in Canada, the proposed charge might have been correct. The difficulty is that the defendant, after having neglected the animals for a period largely in excess of the time fixed by the statute, brought them back into the United States and continued to neglect them here.

We are satisfied that the trial court correctly interpreted the statute and that to hold otherwise would be to enable all railroads running through the Province of Canada from the west to the east and *vice versa*, to evade the law with impunity.

The judgment is affirmed with costs.

[Cir. 59]



Issued February 23, 1912.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 60.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the United States Circuit Court for the Western District of New York in cases involving apparent violations of the Twenty-eight Hour Law (Act of June 29, 1906; 34 Stat., 607).

SYLLABUS.¹

In an action under the Twenty-eight Hour Law involving the question as to what constitutes proper space and opportunity to rest in the cars for cattle, *Held* that when the cars are not unloaded all the animals contained therein must have sufficient space for lying down at the same time. (U. S. v. New York Central & Hudson River R. R. Company, 186 Fed., 541, followed.)

CIRCUIT COURT OF THE UNITED STATES, WESTERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA	}	Nos. 311 and 312.
<i>against</i>		
THE NEW YORK CENTRAL & HUDSON RIVER		
RAILROAD COMPANY.		

JOHN LORD O'BRIAN, United States Attorney.

HOYT & SPRATT (Alfred L. Becker of Counsel) for Defendant.

HAZEL, J.:

The object of actions Nos. 311 and 312 is to recover penalties which the government claims have been incurred by the carrier for violation of the Twenty-eight Hour Law, so-called, approved June 29, 1906. By consent of the parties and pursuant to order of this court the said actions which in material matters are similar were tried together and at the conclusion of taking testimony the defendant moved that they be consolidated upon the authority of *United States v. Baltimore & Ohio Southwestern Railway Company*, decided by the Supreme Court, March 20, 1911, and that under the proofs there could at all

¹ Not by the court.

events have been but one violation of the statute. Before deciding the motion for consolidation a brief statement of the facts will be given:

The shipments of cattle in action No. 311, originated at Chicago, Illinois, on March 17, 1910, the loading being completed at 1:35 o'clock P. M., Central Standard time. The animals were transported in sixteen cars to Suspension Bridge, New York, by the Michigan Central Railroad Company and there on the next day delivered in cars to the defendant carrier at 9:55 o'clock p. m., central standard time, from whence they were transported to Jersey City, via Newberry Junction, Pa., arriving on March 19, 1910, at 6:40 o'clock p. m., having been en route fifty-two hours and five minutes, and constantly confined without having been unloaded or properly fed or watered save as they were watered and fed at Suspension Bridge and as hereinafter stated.

The shipment of cattle in action No. 312, consisting of eight cars, originated at Joliet, Ill., March 17, 1910, the loading being completed at 1:30 o'clock p. m., central standard time and delivery made to the defendant carrier at Suspension Bridge at the same time that delivery was made of the first mentioned shipment, from whence the transportation proceeded to Newberry Junction, Pa. The total time of shipment was fifty-two hours and ten minutes. The government claims that the cattle were given some water and food at Suspension Bridge but that they were not properly fed or watered, and that each car was so overloaded that the cattle had no proper opportunity and space for rest. The cars were so-called patent cattle cars which are supplied with hay racks and watering pans.

The evidence of the government as to action No. 311, was confined to seven cars and it is shown that in each of six cars there were contained about eighteen head of cattle weighing on an average approximately twelve hundred pounds; that to the animals in five cars water was turned into the pans on one side of the cars only; that in the sixth car water was let into the pans on one side but the horned cattle in the cars, about one-half in number, were unable to drink on account of interference with the side of the car just above the watering pans. In the seventh car there were confined sixteen bulls of the average weight of sixteen hundred pounds which originally had been tied with their heads alternating to each side of the car but fourteen were loose and the others were tied in such a way as to make it impossible to reach the watering pans. The animals in five cars out of the seven were given no food whatever although the floor of the car in which the bulls were confined was strewn with hay by defendant's employees on the unloading side. The government gave testimony by witnesses who were familiar with the habits of cattle on the farm and during transportation showing that the cattle in question measured across

the hips from nineteen and one-half to twenty-three inches and from twenty-four to thirty inches through the protuberant portions of their bodies; that in their opinion cattle in transit require about fifteen pounds of hay per head for each twenty-four hours; that in lying down animals weighing sixteen hundred pounds require from thirty-one to thirty-six inches of space while animals weighing but twelve hundred pounds require about twenty-nine inches. From the evidence it is apparent that sixteen animals weighing on an average twelve hundred pounds constitute a carload of ordinary dimensions.

The testimony of the defendant indicates that it was the practice to put hay in the cars at Suspension Bridge stockyards whenever it was necessary and the superintendent of the stockyards testified that so far as he knew the custom or rules for feeding were carried out by the subordinates. But I think the testimony of the Government inspectors who kept such cars under observation for the purpose of ascertaining the quantity of food given to each car is sufficiently clear to warrant the conclusion that the cattle were not properly fed and watered. In some instances insufficient hay was given, in others not enough hay or water and in some cars the cattle could not get at the water. Testimony was given by the defendant that customarily all the cattle in a car will not lie down; that more often a number stand while the others lie; that sufficient hay and water was put in the cars. I think the predilection of the animal would be to lie down in transit if the conditions permitted; that more space should have been provided and so many should not have been put in the cars. Regard must be had to the weight of the cattle in placing them in cars of the kind in which the shipments were made. The statute provides that cattle shall not be confined continuously for more than thirty-six hours unless they are carried in cars in which they can and do have proper food and water and opportunity for rest. It will be noticed that it is optional with the carrier to either unload the cattle for rest, food and water or to give them proper food, water and rest or opportunity for rest while in transit without unloading. Congress primarily intended that cattle should be unloaded every twenty-eight or thirty-six hours but if the cars are properly equipped and suitable for food and rest then unloading was not required. When, therefore, the cars are not unloaded all the animals contained therein must have sufficient space for lying down at the same time. The probabilities are that they will not all lie at the same time but nevertheless opportunity must be given them to do so. In a recent case for violation of the statute under consideration (*U. S. v. The New York Central & Hudson River Railroad Co.*, 186 Fed. Rep., 541) it was said by Judge Holt:

“It is probably true that they would not all want to lie down at one time, but to compel cattle to stand for sixty-five hours continu-

ously under such wearisome conditions as must attend a transportation by rail for such a period of time is clearly a serious form of cruelty. * * * The provisions of the act for their protection are conservative enough, and should be strictly enforced, particularly in the matter of furnishing them water."

With this holding I am in entire accord. My conclusion on the evidence is that the cattle were not properly fed or watered, and, moreover, that they did not have proper space and opportunity for rest.

The actions, however, must be consolidated as I think within the ruling made recently by Justice Lamar in *United States v. Baltimore & Ohio Southwestern Railway Co.*, *supra*, speaking for the Supreme Court, there was but one violation of the statute. The cars though loaded at different points, viz: at Chicago and at Joliet, Illinois, were nevertheless, as was conceded at the hearing, consolidated into one train at Michigan City, Michigan, and were subsequently delivered to the connecting carrier, the defendant, at Suspension Bridge, New York, at the same time. The consignors and consignees were the same in both cases and the destinations of the animals the same. While it may be true that the legal period of confinement of the cattle first loaded at Joliet expired a few minutes earlier than that of the shipment which originated at Chicago, there was practically but one offense, and the slight difference in the time when the lawful periods expired, is insignificant, and, therefore, giving the statute a reasonable construction may be disregarded.

A decree may be entered covering both actions for a penalty of five hundred dollars, with costs.

Dated July 5, 1911.

[Cir. 60]



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 61.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the United States Circuit Court for the Western District of New York in a case involving an apparent violation of the Twenty-eight Hour Law (Act of June 29, 1906; 34 Stat., 607).

SYLLABUS.¹

1. In an action under the Twenty-eight Hour Law involving the question as to what constitutes proper space and opportunity to rest in the cars for cattle, *held* that the requirements of the statute providing for giving opportunity to rest are not unreasonable and a fair construction requires that the space allowed each animal shall be such as to permit him to lie down ad libitum. (U. S. v. New York Central & Hudson River R. R. Co., 186 Fed., 541, followed.)

2. The Twenty-eight Hour Law was passed out of motives of humanity, as well as to insure the wholesomeness of the food after the animal is slaughtered.

CIRCUIT COURT OF THE UNITED STATES, WESTERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA }
 against } No. 316.
ERIE RAILROAD COMPANY. }

JOHN LORD O'BRIAN, United States Attorney.

MOOT, SPRAGUE, BROWNELL & MARCY (JOHN W. RYAN) for Defendant.

HAZEL, J.:

This is an action to recover penalty under section 3 of the act of June 29, 1906, which provides for imposing a penalty for failure to unload for rest, water, and food cattle transported interstate. It is admitted that within the lawful period the animals were given proper food and water at the stockyards at Suspension Bridge before

¹ Not by the court.

delivery was made to the defendant carrier. The single question presented for decision is whether the cattle had proper opportunity to rest within the period of 28 hours or within the extension period—36 hours.

The shipment was from Chicago, Ill., to Kearney, N. J., and the time was 65 hours and 10 minutes, excluding the time consumed in loading. The cars were 36 feet long and 8 feet 7 inches wide. Evidence is given by the Government showing that cattle weighing 1,300 pounds occupy a space of 36 inches in width when lying down and that the average steer weighs between 1,200 and 1,300 pounds. It is shown that in car 8800 there were confined 15 bulls tied alternately head and tail, weighing on an average 1,477 pounds; that in car 8054 were confined 14 cattle weighing on an average 1,311 pounds each, and 3 large-sized cattle weighing on an average 1,477 pounds each; that in car 8188 were confined 16 cattle weighing on an average 1,311 pounds each, and in car 8014, 18 cattle were transported weighing on an average 1,270 pounds each. It was proven that an animal weighing from 1,200 to 1,300 pounds measures from 19 to 21 inches across the hips and somewhat more when measured across the abdomen. Some of the cattle were measured by the witness Hamilton, who testified that those measured while lying down, and which weighed about 1,300 pounds, occupied a car space of 36 inches in width. Dr. Wende testified that an average steer lying down required car space approximately from 32 to 36 inches. Other witnesses for the Government testified that the minimum space in width that should be allowed each steer of average size would be not less than 2 feet and 6 inches. Such opinion by the Government inspectors finds corroboration in the rules and regulations of the Government providing for space in the export transportation of cattle.

The defendant gave testimony to show that the habits of cattle in transportation are such that they would not all lie down at the same time, and therefore it is urged that it was unnecessary and is unreasonable to require loading a car so that all the animals confined therein could lie down and rest at the same period of time.

The principal dispute between the Government and the defendant is whether the cars used in the transportation were strictly required to contain sufficient space to permit all the animals to lie down at the same time or whether it was a sufficient compliance with the statute to load the car on the assumption that customarily all the animals will not lie down at the same time. It is conclusively shown that none of the cars used for the shipment afforded sufficient space for all the animals to lie down at the same time. The requirements of the statute providing for giving opportunity to rest are not unreasonable, and, in my opinion, a fair construction required that the space allowed each animal shall be such as to permit him to lie down

ad libitum. (U. S. *v.* New York Central & Hudson River R. R. Co., 186 Fed. Rep., 541; U. S. *v.* New York Central & Hudson River R. R. Co., decided to-day by this court.) The cars should not be overloaded, and if it occurs that sufficient space has not been provided so as to enable all the animals to lie down at the same time the carrier must unload the cars at the expiration of 28 or 36 hours to comply with the law, which manifestly was passed out of motives of humanity, as well as to insure the wholesomeness of the food after the animal is slaughtered.

The Government may have judgment herein for the penalty demanded, with costs.

Dated July 5, 1911.

[Cir. 61]

THIS PUBLICATION may be procured from the Superintendent of Documents, Government Printing Office Washington, D. C., at 5 cents per copy



1. The first part of the paper
deals with the general theory
of the subject. It is
divided into two main
sections. The first section
deals with the general theory
of the subject. The second
section deals with the
particular case of the
subject. The paper is
written in a clear and
concise style. It is
well organized and
easy to read. The
author has done a
very good job of
presenting the material.
The paper is a
very good example
of a well written
scientific paper.

2. The second part of the paper
deals with the particular case of the
subject. It is divided into two main
sections. The first section deals with
the general theory of the subject. The
second section deals with the particular
case of the subject. The paper is
written in a clear and concise style.
It is well organized and easy to read.
The author has done a very good job
of presenting the material. The paper
is a very good example of a well
written scientific paper.

Issued March 18, 1912.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 62.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Circuit Court of the United States for the Western District of New York, in cases involving violations of the Twenty-eight Hour Law (Act of June 29, 1906; 34 Stat., 607).

SYLLABUS.¹

1. A judgment recovered from a preceding carrier for violation of the twenty-eight hour law is not a bar to a subsequent action against a connecting carrier, which presumably had knowledge of the length of time the animals had been confined without rest, water, and food, and the defendant is not relieved from complying with the statute on the ground that the preceding carrier first violated its provisions and paid the penalty provided by the statute, even though a new period equal to the statutory time had not expired. (*U. S. v. N. Y. C. & H. R. R. Co.*, 156 Fed., 249; *U. S. v. Lehigh Valley R. R. Co.*, 184 Fed., 871; affirmed, 187 Fed., 1006.)

2. A connecting carrier is bound as a matter of law to make reasonable inquiry of the preceding carriers as to the time the transportations began, and whether the statute was complied with in transit.

3. The statute places the duty of feeding the cattle upon the carrier which transports them to their destination and not upon independent companies which receive the live stock simply to give them food, water, and rest at their stockyards, and then to surrender them to the carrier for a continuance of the journey. If an independent company has actual knowledge of the confinement in cars beyond the time limited, and fails to use due diligence in unloading the live stock, it would doubtless be liable for its disregard of the law. (*U. S. v. Stock Yards Terminal Co.*, 178 Fed., 19.)

4. The words "knowingly" and "willfully" do not imply a wanton or malicious purpose but a failure to exercise diligence by the receiving carriers in unloading for rest, food, and water after receiving the live stock and having reason to know that the animals had not been rested or given food and water within the time specified in the act.

5. A delay of 3 hours and 35 minutes in conveying horses a distance of 7 miles to stockyards, after they have already been confined beyond the statu-

¹ Not by the court.

tory period by the preceding carrier, results in increased cruelty to the animals, and failure to feed and water them is a violation of the statute by the connecting carrier.

6. Where the connecting carrier was without sufficient warning of the arrival of a large number of cars of live stock from different localities over different roads to enable it to provide additional facilities on account of extraordinary congestion at certain stockyards, it was held that a situation was presented beyond the defendant's control and the failure, therefore, to comply with the law was due to unavoidable causes within the meaning of the statute.

7. Cold does not excuse carriers for failure to unload for feeding, watering, and resting within the statutory period.

CIRCUIT COURT OF THE UNITED STATES, WESTERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA, <i>Plaintiff</i> ,	} Nos. 174, 175, 179,
<i>Against</i>	
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, <i>Defendant</i> .	

JOHN LORD O'BRIAN, United States attorney.

HOYT & SPRATT, for defendant.

MAURICE C. SPRATT, ALFRED L. BECKER, of counsel.

HAZEL, J.:

These actions, numbered respectively, 174, 175, 179, 180, 181, 189, 195, 204, 205, 219 and 220, were tried together and after taking testimony were held by consent of the parties to await the decision of the Supreme Court of the United States in *United States v. Baltimore & Ohio Southwestern Railway Company*, decided March 20, 1911. They relate to the recovery of penalties for the violation of the Twenty-eight Hour Law, which prohibits confining animals in cars during transportation interstate for more than twenty-eight consecutive hours without unloading them in properly equipped pens for rest, water and food.

In actions Nos. 174 and 175, which pursuant to the stipulation filed herein, may be consolidated, the material facts are substantially identical. The animals (horses) were transported from Girard, Kansas, by the Wabash Railroad through the Province of Ontario to Black Rock, in the City of Buffalo, where the cars containing them were received by the defendant and transported to its stockyards at East Buffalo, a distance of seven miles, where the animals were unloaded and fed. The Wabash Railroad had possession of them thirty-eight hours and fifty-five minutes and the defendant carrier three hours and thirty-five minutes, or a total of forty-two hours and thirty minutes, en route without rest, water or food. The time of confinement had been extended by the owner of the horses from

twenty-eight to thirty-six hours. A judgment has heretofore been recovered against the Wabash Railroad for violation of the statute concerning the shipment in question but such recovery is not a bar to this action against the connecting carrier, which presumably had knowledge of the length of time the animals had been confined without rest, water and food, and the defendant is not relieved from complying with the statute on the ground that the preceding carrier first violated its provisions and paid the penalty provided by the statute even though a new period equal to the statutory time had not expired. (U. S. v. N. Y. C. & H. R. R. Co. 156 Fed. Rep. 249; U. S. v. Lehigh Valley R. R. Co. 184 Fed. 871; affirmed 187 Fed. Rep., 1006).

It was stipulated herein that the allegations in the complaint stating that failure to comply with the act was knowing and wilful is a legal inference flowing from non-compliance with the statute, and the defendant now contends that it does not affirmatively appear that the offense was knowingly and wilfully committed. It appears, however, that each shipment of live stock received at Black Rock or Niagara Falls by the defendant is generally accompanied by a way bill and running slip which is delivered to the agent of the defendant at or near the point where the cars are run onto its tracks. From the inscription on such documents the agent learns the time and place at which the transportation began and whether the animals were rested and given water and food. In the actions under consideration, no testimony as to such custom was offered by the government, but I think the defendant was bound as a matter of law, to make reasonable inquiry of the preceding carriers as to the time the transportations began and whether the statute was complied with in transit. It is contended by the defendant, on the authority of *St. Joseph Stock Yards Company v. United States* (187 Fed. Rep., 104), that, not having had actual notice to the contrary, it had the right to assume that the preceding carrier had complied with the statute. The case holds that a stockyard company which had not actual notice that the cattle had been confined more than the statutory period and which hauls them a few miles to the yards where they are unloaded for rest, water and food, is not guilty of knowingly and wilfully confining them in violation of the act. The stockyard company was not the actual carrier of the cattle but merely received them for prompt transportation over its own tracks to its stockyards; its business was to receive the cars on its switches and take them to the place of unloading and then to return them to the carrier for a continuance of the journey. There were no way bills or running slips delivered to such company nor did it participate in the freight charges; it merely received a compensation for running each car to its yard for unloading. Here the defendant was directly charged with the responsibility of transport-

ing the animals to their destination and unloading them for food, water and rest within the time limited by the act. It received them from the preceding carrier to continue the journey and I can conceive of no hardship to the defendant in placing upon it the responsibility of inquiring from the preceding carrier whether the animals had received rest, water and food in transit, to the end that if the time had expired and there had been a failure to comply with the act, it might with reasonable promptitude unload them and give them food and water. The statute places the duty of feeding the cattle upon the carrier which transports them to their destination and not upon independent companies which merely receive the live stock simply to give them food, water and rest at their stockyards and then to surrender them to the carrier for a continuance of the journey. If an independent company has actual knowledge of the confinement in cars beyond the time limited and fails to use due diligence in unloading the live stock it would doubtless be liable for its disregard of the law. (U. S. v. Stockyards Terminal Co., 178 Fed. Rep., 19.)

The inquiry as to whether the statute has been violated knowingly and wilfully does not depend solely upon receiving the cattle with actual or constructive notice of the time consumed in the journey by the preceding carrier and that the animals have not been rested or given food and water within the prescribed period, but depends upon whether the connecting carrier after receiving them, intentionally disregarded the statute or neglected to comply with its provisions. The words knowingly and wilfully do not imply a wanton or malicious purpose but a failure to exercise diligence by the receiving carrier in unloading for rest, food and water after receiving the live stock and having reason to know that the animals had not been rested or given food and water within the time specified in the act. The government contends that the defendant was not obliged to accept shipments of stock which had been confined beyond the period fixed by law and that to prevent liability it was either bound to decline to accept the cars in which the animals were confined or must have adequate facilities at its connecting point for immediate compliance with the statute. With these broad contentions I do not agree. To refuse to accept the animals which had been on the road from twenty to thirty hours without food and water when, by the exercise of reasonable diligence the receiving carrier could comply with the law, would not insure humane treatment to the animals transported. And to require railroad companies in large cities to have properly equipped pens for large shipments of cattle at points where they intersect other railroads unloading live stock would be an unreasonable requirement. (U. S. v. Lehigh Valley R. R. Co. *supra*.) The defendant corporation has for many years maintained a proper stockyard at East Buffalo situate about seven miles from

Black Rock, which is in the Northern part of the city, and its branch road upon which the animals were received, runs directly thereto, and to require additional facilities at its different connecting points within the limits of the city would be utterly impracticable and, as contended, might even be a violation of the city ordinances. Ordinarily it takes from fifteen to twenty hours to convey live stock from the state of Michigan through Canada to Black Rock and, under favorable conditions, about an hour and a half from the latter point to the stockyards at East Buffalo. Hence, the principal question to be decided is whether the defendant having either actual or presumptive knowledge of the length of time the animals were confined exercised reasonable dispatch after delivery to it by the preceding carrier, in transferring them to the stockyard for feeding. The proofs show that the road way of the defendant between Black Rock and its stockyard will not admit of rapid transportation on account of the street and railroad crossings and not infrequently freight cars are delayed by passenger trains in coupling and uncoupling the cars, switching and other conditions which arise in the railroad yards in the outskirts of the city. The horses in actions Nos. 174 and 175 were in the possession of the defendant and under its control before they were unloaded and fed a period of three hours and thirty-five minutes, which I think was too long and the cattle should have been rested and fed within that period. The evident delay in taking them to the stockyard, a distance of seven miles, in view of the length of time they had already been confined without feeding, resulted in increased cruelty for which the defendant has incurred the penalty of the law.

In action No. 179, the animals (lambs) were transported from Lennon, Michigan, to Black Rock, in the city of Buffalo, via the Grand Trunk Railway through Canada, and were en route to Black Rock forty-four hours and forty-one minutes and were in the defendant's possession one hour and forty-five minutes additional. The way bill and running slip accompanied the shipments from which the agent of the defendant when he received the animals could and did inform himself of the length of time they had been confined without rest and food. The defendant's witness Brodie testified that the cars were received at 4:20 o'clock P. M. instead of 1:30 P. M. as claimed by the Government, and the foreman of the stockyards testified that the cars were received for unloading at 6:05 o'clock P. M. the unloading being completed within an hour thereafter. Considering the local conditions on the outskirts of the city, the disarrangement of the Belt Line track due to the improvements which were being made at the grade crossing, I think the journey from Black Rock to the stockyard was reasonably diligent, and as said by Judge Holt in *United States v. Lehigh Valley Railroad*, *supra.*, was "sub-

stantially a part of the process of unloading". There can be no positive standard of time in which animals received by the defendant shall be transferred from where they are received to its stockyard for unloading. Each case must depend upon its own facts and circumstances to indicate whether diligence has been exercised in compliance with the law.

In action No. 180, the transportation consisted of horses from St. Johns, Michigan, to Black Rock, via the Grand Trunk Railroad through the Province of Ontario. The horses were in transit to Black Rock forty hours without rest or food. The shipper had extended the time to thirty-six hours. The defendant accepted the cars in which the animals were confined and proceeded to the East Buffalo stockyard where they were unloaded and fed, being in the possession of the defendant one hour and thirty minutes. Adopting the rule of diligence hereinbefore indicated I find there was no unreasonable delay on the part of the defendant in conveying the horses to the stockyards and properly feeding them.

In action No. 181, certain cattle, calves and swine had been transported from Imlay City, Michigan, through Canada, to Black Rock, where the defendant received them. They were in transit to the connecting carrier forty-four hours and forty minutes (time having been extended by shipper), and were conveyed to the stockyards by the defendant and there unloaded for feeding in one hour and thirty minutes. Such transfer and unloading was with reasonable promptitude.

In actions Nos. 189 and 195, it is shown that the agent of the defendant at Black Rock was misled by an erroneous inscription on the way bills accompanying said shipments indicating that the animals had been loaded at a different time than that claimed by the Government, from which he assumed that they had been rested and fed by the preceding carrier. It is not claimed that the inscription on the way bill or running slip was changed, altered or erased with the knowledge or connivance of the defendant and I think the witness was honestly misled and therefore the defendant is excused from liability.

In actions Nos. 204 and 205, which were consolidated by consent of the parties and pursuant to the ruling in *United States v. Baltimore & Ohio Southwestern Railway Co. supra.*, the confinements of the swine and cattle without water or food were in excess of the period allowed by law. The transportation started from Caro, Michigan, over the Michigan Central Railroad through the Province of Ontario to Black Rock, where, on October 6th, 1907, at eleven o'clock at night, the defendant received the cars and unloaded them at noon the next day at the East Buffalo stockyards. The swine were confined in car No. 9446 without food, water or rest for forty-three

hours, and the sheep and calves in car No. 9444 forty-one hours and thirty-five minutes. They were in possession of defendant carrier before unloading eight hours and eleven hours, respectively. Such delay is claimed by defendant to have been due to the unusual number of arrivals of cars containing live stock at the East Buffalo stockyards as a result of which there was a congestion in the yards and chutes, a condition which could not have been foreseen or guarded against by the exercise of due diligence and foresight. Defendant's witness Perhamus testified that at the time in question a total of four hundred and seventy-eight cars were received at the stockyard for unloading from different carriers, and during his six years' experience he had never known of so many cars containing cattle having been received during a period of forty-eight hours. In fact he testified that there were two hundred more cars tendered than on any prior occasion to his knowledge, and that owing to such congestion the delay was about twelve hours. The Government, citing *United States v. Union Pacific R. R. Co.* (169 Fed. Rep., 69) and *United States v. Southern Pacific R. R. Co.* (157 Fed. Rep., 459), contends that unusual press of business does not excuse the defendant from complying with the act. In the cases cited the defendants knew of the existence of the causes which prevented feeding, watering or unloading, and the court held that by the exercise of reasonable diligence the carrier could have avoided the arrival of the animals at the stockyards. But such were not the facts in the case under consideration. While the defendant was informed by telegraph that the cars in question were in transit yet such information was not received in time to enable unloading the live stock at another place where there were facilities for so doing, and I am satisfied by the evidence that the conditions at the stockyards at the arrival of the cars in controversy were extraordinary; that a situation was presented which was beyond the defendant's control and, moreover, that the defendant was without sufficient warning of the arrival of the live stock from different localities over different roads to enable it to provide additional facilities. The failure, therefore, to comply with the law was due to unavoidable causes.

In actions Nos. 219 and 220, which were consolidated by agreement, the evidence showed that the cattle, calves, sheep and hogs were transported from Kinde, Michigan, through the Province of Ontario, to Niagara Falls, where the defendant received the cars in which they had been confined without food, water or rest for a period of forty hours, the time having been extended by the shipper to thirty-six hours, and proceeded to East Buffalo. The defendant had possession of the animals for seven and one-quarter hours before they were unloaded and fed. It claims that sufficient food, water and rest were furnished at its stock pens at Niagara Falls. The

claim of the Government is that although the cattle were unloaded, only a small quantity of hay was fed to them, and, furthermore, that the facilities for proper feeding and rest at Niagara Falls were deficient and inadequate. The statute in explicit terms provides not only for resting and feeding live stock in transit, but also that they shall be unloaded in a "humane manner in properly equipped pens". The proofs are that the cattle pens were open and unprotected from the wind and snow and were not properly equipped with watering troughs. The calves were not unloaded and the cattle were rested only about one hour and thirty minutes. It was a cold night and the defendant seeks to mitigate its conduct also because of the severity of the weather, but though it was cold the night was not stormy and the conditions of the weather were not such as to warrant holding that the defendant was prevented by the storm from complying with the law.

My conclusion is that a single judgment should be entered for the United States in cases Nos. 174 and 175, for a penalty of five hundred dollars; also in consolidated actions Nos. 219 and 220, the United States may enter a single judgment for a penalty of five hundred dollars; in actions Nos. 179, 180, 181, 189, 195, 204, and 205, for the reason hereinbefore stated, the complaints are dismissed.

Dated, September 27th, 1911.

ADDITIONAL COPIES of this publication
may be procured from the SUPERINTEND-
ENT OF DOCUMENTS, Government Printing
Office, Washington, D. C., at 5 cents per copy



Issued April 23, 1912.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 63.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinion of the Circuit Court of Appeals for the Eighth Circuit, reversing judgment of the District Court for the District of Nebraska, in a case involving alleged violation of the Act of June 29, 1906 (34 Stat., 607), commonly known as the "Twenty-Eight Hour Law."

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 3637—DECEMBER TERM, A. D. 1911.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR, vs. UNITED STATES OF AMERICA, DEFENDANT IN ERROR.	}	In Error to the District Court of the United States for the Dis- trict of Nebraska.
--	---	--

Mr. ARTHUR R. WELLS (Mr. JAMES E. KELBY was with him on the brief) for plaintiff in error.

Mr. F. S. HOWELL, United States Attorney, appeared for defendant in error.

Before SANBORN and CARLAND, Circuit Judges.

SYLLABUS.

1. CARRIERS—TWENTY-EIGHT HOUR LAW—ACCIDENTAL OR UNAVOIDABLE CAUSES—
DUE DILIGENCE AND FORESIGHT—WILFULLY.

The measure of due diligence and foresight is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. And the due diligence and foresight which condition the anticipation and avoidance of the other incidental or unavoidable causes specified in the twenty-eight

hour law is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under like circumstances.

An accidental or unavoidable cause which cannot be avoided by the exercise of due diligence and foresight in the meaning of this law is a cause which reasonably prudent and careful men under like circumstances do not and would not ordinarily anticipate and whose effects under similar circumstances they do not and would not ordinarily avoid.

“Wilfully” means “purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.”

2. CARRIERS—TWENTY-EIGHT HOUR LAW—FACTS—CONCLUSION.

A train load of 17 cars of sheep started at five in the morning to make a run which ordinarily requires 11 hours. This train and its drawbars were inspected and found in good condition on the morning it started. In order to unload the sheep in time it was necessary that this train should make the run in 12 hours. It was delayed about 2 hours by the breaking of a drawbar and chain of a train which met and passed it, by the slipping of a knuckle in the coupler which separated it into two parts and by the pulling out of two drawbars in its cars which made it necessary to draw the two parts of the train upon a side-track and re-couple them. Upon its arrival the company dragged the sheep out of two of the cars in the dark within the 36 hours, but left 15 of the cars unloaded until the next morning after the expiration of the 36 hours.

HELD: There was no substantial evidence that the company wilfully violated the law and there was substantial evidence that it was prevented from unloading the sheep within the 36 hours by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight.

SANBORN, Circuit Judge, delivered the opinion of the court.

In an action against the Railroad Company under the twenty-eight hour law, Act June 29, 1906, Chap. 3594, 34 Stat. 607 (U. S. Comp. Stat. Supp. 1907, page 918, Supp. 1909, page 1178), in which the defenses were that the company did not knowingly and wilfully violate the law and that it was prevented from complying with it by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, the court below instructed the jury to return a verdict for the defendant and this ruling is specified as error.

Section 1 of the Act of June 29, 1906, provides that no railroad company engaged in the interstate transportation of sheep and other

like animals shall confine them in cars more than 28 hours, without a request from the owner or person in custody, and then not more than 36 hours, "unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight," and Section 3 declares "that any railroad company which knowingly and wilfully fails to obey this prohibition shall pay a penalty of not less than \$100.00 nor more than \$500.00."

The measure of due diligence and foresight is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. And the due diligence and foresight which condition the anticipation and avoidance of the other accidental or unavoidable causes described in this law is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under similar circumstances. An accidental or unavoidable cause which cannot be avoided by the exercise of due diligence and foresight within the meaning of this law is a cause which reasonably prudent and cautious men under like circumstances do not and would not ordinarily anticipate and whose effects under similar circumstances they do not and would not ordinarily avoid. *The Olympia*, 61 Fed. 120, 127; *United States v. Kansas City Southern Ry. Co.*, 189 Fed. 471, 477; *Southern Pacific Company v. Hetzer*, 135 Fed. 272, 281, 283, 284, 68 C. C. A. 26, 35, 37, 38; *Chicago Great Western Ry. Co. v. Egan*, 159 Fed. 40, 45, 86, C. C. A. 230, 235.

The shipment consisted of 17 double-decked cars of sheep. They had been confined in the cars about 18 hours when, at five in the morning on August 7, 1909, they started from Alliance for Aurora, which was 220 miles distant. The time ordinarily required for a freight train to make this run was 11 hours, and if it followed the usual course it would arrive by six or seven in the afternoon. There were feeding pens where these sheep could be unloaded, fed and rested at Alliance and at Aurora, but none properly equipped for the feeding and resting of this shipment between these stations and as sheep cannot be unloaded with facility on dark nights it was necessary, in order to prevent their confinement beyond the 36 hours during which the owner had requested their confinement, that they should arrive in Aurora by seven in the afternoon, for it became dark about 8.30 or 9 p. m., and an hour and a half or two hours were required to unload them. This train was unavoidably delayed about two hours by this series of accidents. It was running east and was scheduled to pass freight No. 1918, which was coming west, at Birdsell. Train No. 1918 broke a drawbar at a station east of Birdsell and when it had been chained together again it broke the chain, and these accidents delayed its arrival at Birdsell so much that it delayed the sheep train there thirty minutes. At Reno, a

station east of Birdsell, the knuckle of one of the automatic couplers in the sheep train slipped by, the train broke into two parts, the train crew were compelled to haul these parts on to a side-track, couple them together, permit a passenger train, that was some distance behind them, to pass and were then compelled to wait until this passenger train cleared the block before they proceeded, so that this accident delayed their train about 25 minutes. A quarter of a mile west of the station of Weir the sheep train pulled out two drawbars, one next to the engine and the other farther back in the train, and its crew was compelled to chain the forward part of the train to the engine and to draw it on to a side-track at the station and then to go back and haul the rear part of the train to the same place and to couple them together again, and this accident delayed the train 55 minutes.

There is no evidence that any of these delays were caused by the negligence of the company or of its servants. There is undisputed testimony that the sheep train and its drawbars were inspected at Alliance and that they were in good condition, that drawbars sometimes pull out and knuckles in automatic couplers sometimes slip by, that it is impossible to prevent such occasional accidents and that the train dispatcher could not, from his practical experience, undertake to calculate when a train would be delayed by reason of the pulling out of drawbars. Such an unusual series of accidents, the pulling out of three drawbars, the breaking of a chain and the slipping of a knuckle, causing three successive delays, is not the natural and probable effect of running a freight train 11 hours, and hence it is not conclusive proof of a lack of due diligence and foresight for the operators of trains to fail to anticipate it and to run the train on the theory that it will not occur.

There was no negligence in the failure to provide feeding pens between Alliance and Aurora for such loads of sheep or cattle, because only 11 hours were required to make the run.

There were three or four loading and unloading chutes and pens between the stations of Alliance and Aurora into each of which three or four cars could have been unloaded, but there is no evidence that the sheep in these 17 cars could have been unloaded and provided with food, water and rest in these small pens at the way stations after the delays mentioned had occurred and before darkness fell on August 7, 1909. This was a through shipment and the failure to unload the sheep under these circumstances at these way stations constituted no lack of due diligence to avoid the causes and effects of the delays.

The conclusion is that the preponderance of the evidence in this case was that the railroad company was prevented from unloading these sheep within the 36 hours by accidental causes which could

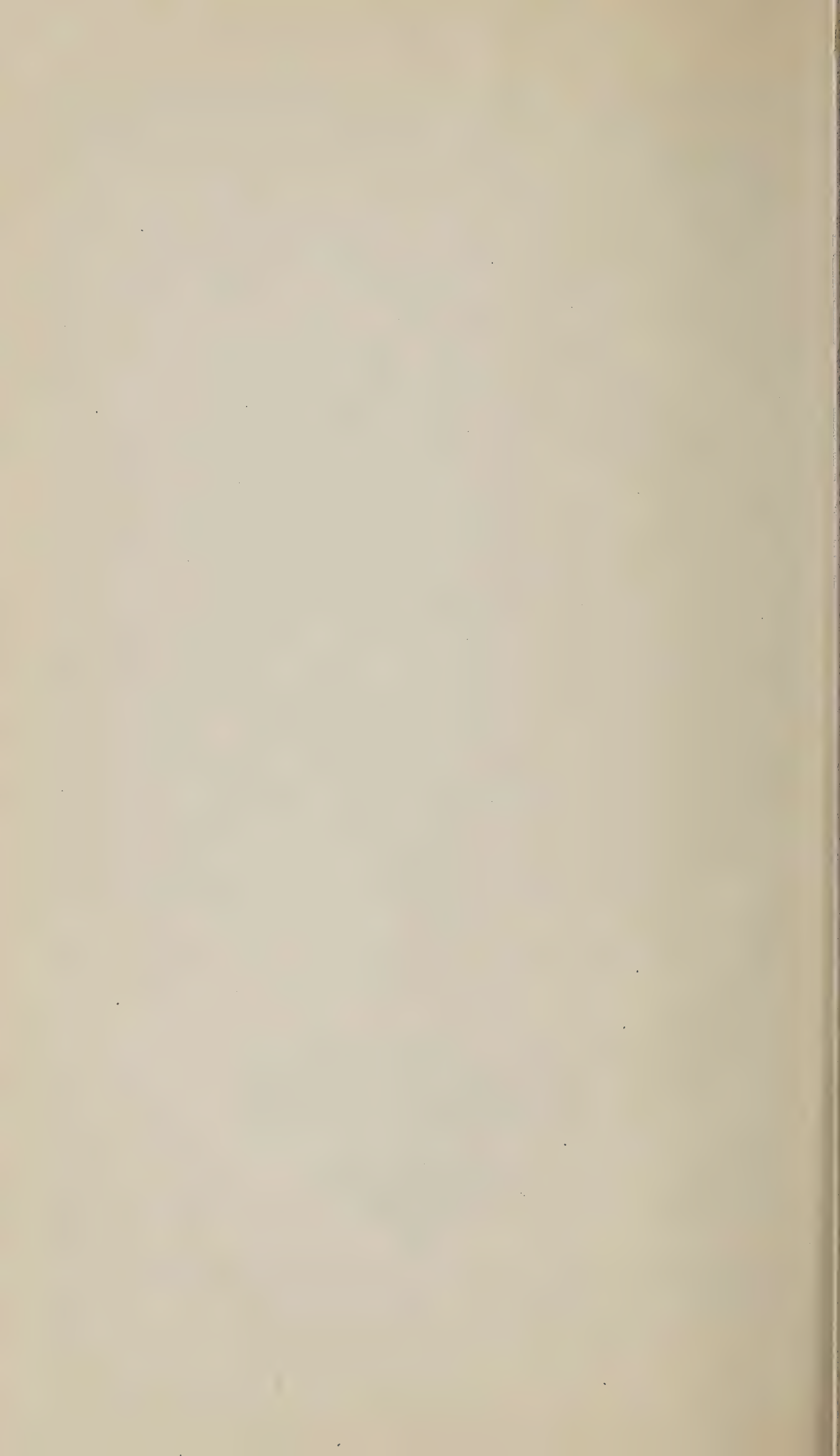
not be anticipated or avoided by that due diligence and foresight which reasonably prudent and careful men ordinarily exercise in like circumstances and that there was not only no conclusive, but no substantial evidence that it knowingly and wilfully failed to comply with the law.

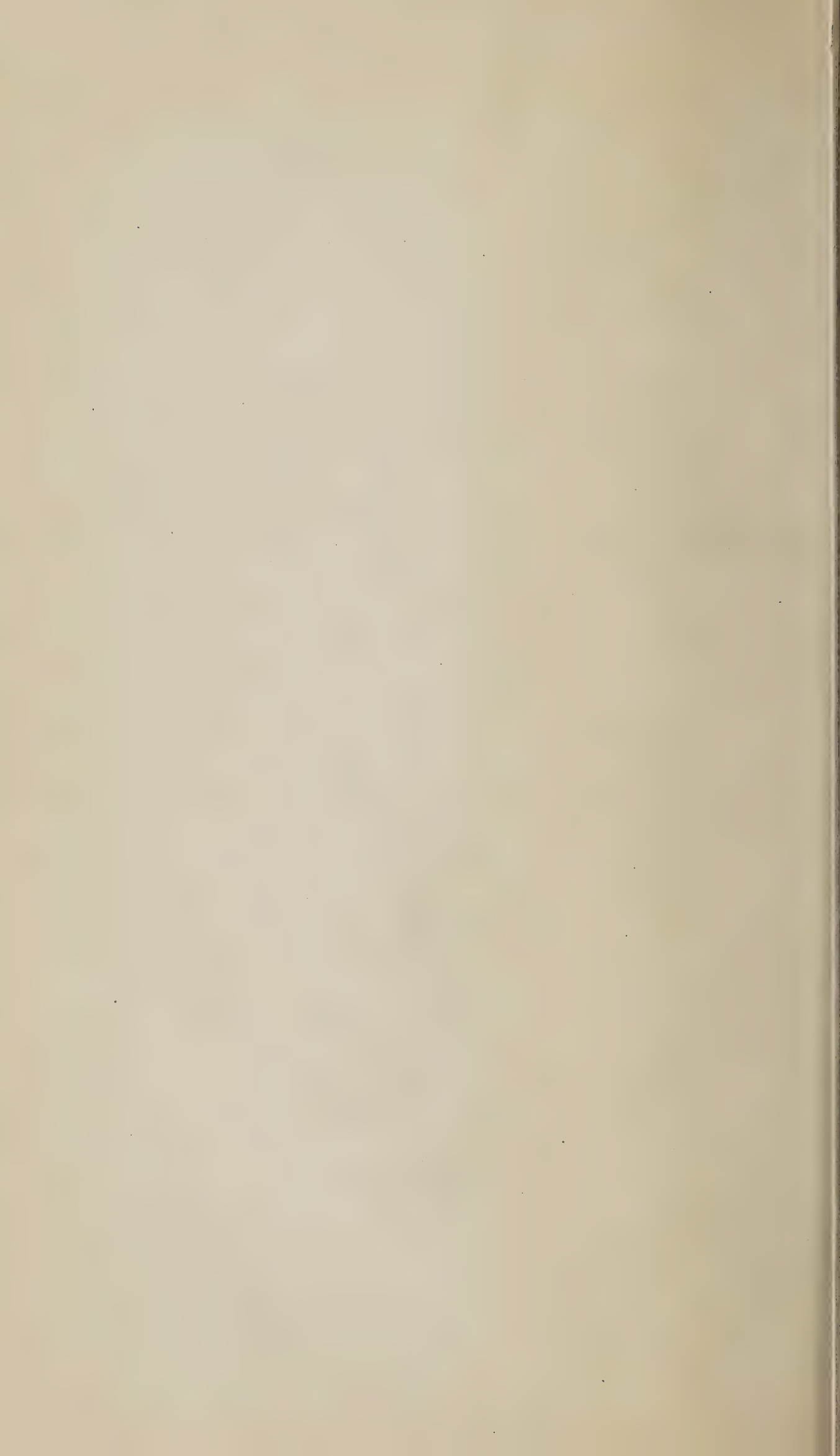
“Wilfully” means “purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.” *St. Louis & S. F. Ry. Co. v. United States*, 169 Fed. 69, 71, 94 C. C. A. 437. There is no proof of any such attitude on the part of this carrier. The natural and probable result of sending this train of sheep out of Alliance at 5 A. M. on August 7 was that it would arrive at Aurora and the sheep would be unloaded before dark on the afternoon of that day. Unforeseen and independent accidental causes which reasonably prudent men under like circumstances do not anticipate and would not have anticipated under the circumstances of this case, turned aside the ordinary and natural flow of events and wrought an unexpected delay of the train. When this delay had occurred the railroad company rushed it to Aurora at the rate of 28 miles an hour and when it arrived there spent two hours dragging the sheep out of two of the cars in the dark until its servants became so exhausted that they could not continue the work. It was then suspended until daylight when in an hour and a half the sheep walked out of the remaining 15 cars. Because there was no substantial evidence in this case of a wilful violation of the law by the company and because there was substantial evidence that it was prevented from unloading the sheep in due time by accidental causes which could not be anticipated or avoided by the exercise of due diligence and foresight, the judgment below is reversed and the case is remanded to the court below with directions to grant a new trial.

Filed February 28, 1912.

ADDITIONAL COPIES of this publication
may be procured from the SUPERINTEND-
ENT OF DOCUMENTS, Government Printing
Office, Washington, D. C., at 5 cents per copy







2. SAME—ENJOYMENT OF FOOD ETC. BY ANIMALS ESSENTIAL TO EXCUSE.

That excuse is that the animals can and do have proper food, water, space and opportunity to rest in the cars which transport them.

The facts that their owner or care-taker who accompanies them agrees with the railroad company to care for, feed and water them and that food and water with which he might have performed his contract were easily accessible to him on his way, are insufficient to establish this excuse where the animals are knowingly and wilfully confined by the company more than twenty-eight hours and they do not actually have proper food and water or space and opportunity to rest during the transportation.

3. SAME—KNOWINGLY AND WILFULLY CONFINING ANIMALS THAT LACK PROPER FOOD CONSTITUTES OFFENSE.

It is not essential to the recovery of the penalty that proof be made that the defendant knew that the animals did not have proper food, water or space to rest in the cars which carried them. It is sufficient that it knowingly and wilfully confined them more than twenty-eight hours and the animals did not have proper food, water, space and opportunity to rest in the cars which transported them.

SANBORN, Circuit Judge, delivered the opinion of the court.

In an action against the Railroad Company under the twenty-eight hour law, Act June 29, 1906, Chap. 3594, 34 Stat. 607 (U. S. Comp. Stat. Supp. 1907, page 918, Supp. 1909, page 1178), the court below instructed the jury to return a verdict for the plaintiff and that ruling is specified as error.

Section 1 of the twenty-eight hour law provides that no railroad company engaged in interstate transportation of cattle, swine or other animals shall confine them for a longer period than twenty-eight consecutive hours without unloading them for rest, water and feeding, except in cases not material in this suit, and Section 3 provides that any railroad company which knowingly and wilfully fails to comply with this provision shall forfeit and pay a penalty of not less than \$100.00 nor more than \$500.00, "provided that when animals are carried in cars in which they can and do have proper food, water, space and opportunity to rest the provisions in regard to their being unloaded shall not apply."

It is not indispensable to a recovery of a penalty under this statute that the government should negative the excuse embodied in the proviso. That excuse is a separate topic, a defense, and the burden is on the defendant to establish it. *New York Central & Hudson R. Ry. Co. v. United States*, 165 Fed. 833, 837, 91 C. C. A. 519, 523; *Chitty on Pleadings*, *246, *247. It is that the animals can and do

have proper food, water, space and opportunity to rest in the cars which transport them. The facts that their owner or care-taker who accompanies them, agrees to care for, feed and water them on their way and that food and water with which he might have performed his agreement were easily accessible to him, are not sufficient to establish this excuse where the animals are knowingly and wilfully confined more than twenty-eight hours and they do not actually receive proper food, or water, or space and opportunity to rest.

Nor is it essential to the recovery of the penalty that proof should be made that the defendant knew that the animals did not receive proper food, water or space to rest in the cars which transported them. It is enough that the railroad company knowingly and wilfully confined them more than twenty-eight hours and the animals did not have proper food, water, space and opportunity to rest in the cars that carried them during the transportation.

The proof in this case was conclusive that the animals were confined seventy-two hours in a car which contained them and other emigrant movables while it was hauled from Minneapolis to Bertrand, Nebraska. There was evidence that when the car left Minneapolis the care-taker, who accompanied it under a contract with the railroad company that he would feed, water and care for the stock, had a barrel of water, 400 pounds of hay and a bushel of oats in the car to feed three horses, two cows and one hog, that about an hour after the defendant in this case received this car at Sioux City, Iowa, which was about eighteen hours after it left Minneapolis, this care-taker, who was in the car, told the conductor that he had plenty of room and would feed and water the animals in the car, that the conductor thereupon endorsed on the car waybill, "Man in charge, has feed and water in car, O. K.", and thereafter none of the servants of the defendant examined the interior of the car or learned by actual observation whether or not the animals had food or water and they relied on this memorandum of the conductor. The record contains evidence from which the jury might find that this stock had proper water and proper space and opportunity to rest in the car, but none that would sustain a verdict that they had proper food. The view of the evidence most favorable to the company goes no farther than to tend to show that when the animals left Sioux City, about 65 hours before they reached Bertrand where they were first unloaded, there was feed enough in the car to give them one meal, there is no evidence that any more feed went into the car during the trip and horses and cattle which do not have more than food enough for one meal in two days and a half do not have proper food. The judgment below is *Affirmed*.

Filed February 28, 1912.

ADDITIONAL COPIES of this publication
may be procured from the SUPERINTEND-
ENT OF DOCUMENTS, Government Printing
Office, Washington, D. C., at 5 cents per copy



Issued September 6, 1912.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 65.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the District Court for the District of New Jersey in a case involving an alleged violation of the Twenty-eight Hour Law (act of June 29, 1906; 34 Stat., 607).

SYLLABUS.¹

1. The penalty provided by section 3 of the Twenty-eight Hour Law can only be applied when the carrier has failed to comply with the provisions of both sections 1 and 2.

2. The Twenty-eight Hour Law is penal and must be strictly construed.

3. No offense is created by the Twenty-eight Hour Law which does not contain as one of its elements the confinement of the animals being transported in the cars, boats, or vessels of the carrier for a period longer than 28 consecutive hours without unloading.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA }
v. }
LEHIGH VALLEY RAILROAD COMPANY. }

On motion to direct a verdict for the defendant non obstante veredicto.

Mr. HOBART, for the motion.

JOHN B. VREELAND, U. S. District Attorney, contra.

MEMORANDUM.

CROSS, *District Judge*:

This action is based upon what is popularly known as the twenty-eight hour law; an act intended to prevent cruelty to animals while being transported in interstate commerce. The question reserved

¹ Not by the court.

at the trial was whether the time the animals were confined to the pens of the defendant at Jersey City, should be included in the twenty-eight hour period during which the stock was not fed. The questions of fact as to whether the animals were fed and whether the defendant knowingly and wilfully failed to comply with the provisions of the statute were submitted to the jury which found a verdict thereon in favor of the United States. The pertinent portions of the Statute are as follows:

SECTION 1. "No railroad * * * carrying or transporting cattle, sheep, swine or other animals * * * shall confine the same in cars, boats or vessels of any description, for a period longer than twenty-eight consecutive hours, without unloading the same in a humane manner into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm," etc.

Section 2 provides that "animals so unloaded shall be properly fed and watered during such rest, either by the owner * * * or by the railroad * * * at the expense of the owner."

Section 3 provided that "any railroad * * * who knowingly and wilfully fails to comply with the provisions of the two preceding sections, shall for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred, nor more than five hundred dollars."

The facts so far as we are at present concerned with them, are as follows: The animals after having been unloaded, fed and watered at Coxton, Pa., were reloaded by the defendant into its cars at that place at 6.15 P. M., February 18, 1911. At 3:15 P. M. February 19, they were unloaded into the stock pens of the defendant company at Jersey City but were not fed. They remained there in the stock pens of the company until February 20, at which date at 3:15 A. M., they were loaded on a barge of the defendant and conveyed to their destination, where they were delivered at 8:00 A. M. of that day. It thus appears that the animals were in charge of the defendants in interstate transportation for a period of thirty-seven hours and forty-five minutes, without being fed. During twelve hours of that period, however, the animals were confined in the stock pens of the defendant at Jersey City, and not in its cars, boats or vessels of any description.

The penalty of Section 3 can, as expressly provided, be only applied when the carrier has failed to comply with the provisions of both sections 1 and 2, that is, the carrier must have confined the animals in cars, boats or vessels for a period longer than twenty-eight consecutive hours without unloading the same into pens for rest, water and feeding, and it must also have failed to properly feed and water the animals so unloaded during such period of rest. The animals in question were not however confined in the cars, boats or vessels of any

description, of the defendant, for a longer period than twenty-one *consecutive* hours, or for a longer period in all than twenty-five hours and forty-five minutes during their transportation from Coxton, Pa., to their destination. Consequently there was no infraction of the Statute.

The statute under which this action is brought is penal and must be strictly construed. At all events, it cannot be so construed as to create offences and inflict penalties not in terms expressed, or necessarily implied from what has been expressed. It seems too plain for argument that no offense is created by this statute which does not contain as one of its elements, the confinement of the animals being transported in the cars, boats or vessels of the carrier, for a period longer than twenty-eight *consecutive* hours, without unloading, etc. In order to make out a violation of the statute in this case, at least seven hours of the period during which the animals were unloaded and resting in stock pens, must be tacked to the twenty-one hour period of confinement in the cars of the defendant. Moreover, if we take the total period of confinement in the cars, boats and vessels of the company, it only amounts to twenty-five hours and forty-five minutes made up of twenty-one hours confinement in its cars and four hours and forty-five minutes on its barge, which hours of confinement furthermore, were not *consecutive* as provided by the act.

The act neither in terms nor by necessary intendment, embraces the case in question. Indeed, its language prohibits the construction which the government seeks to put upon it. If congress had intended to cover a situation like that presented here, it could easily have done so by prohibiting the confinement in any manner, of animals being transported in interstate commerce for a period longer than twenty-eight hours without feeding, watering and resting them, etc. Confessedly my inclination has been to so construe the act, if possible, as to make it cover the case in question, but it cannot be done, in my judgment, without an exercise of the legislative, rather than the judicial function.

Accordingly judgment will be entered for the defendant *non obstante veredicto*.

JOSEPH CROSS, *Judge*.

[Cir. 65]

ADDITIONAL COPIES of this publication
may be procured from the SUPERINTEND-
ENT OF DOCUMENTS, Government Printing
Office, Washington, D. C., at 5 cents per copy





United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 66.

GEO. P. McCABE, Solicitor.

THE PLANT QUARANTINE ACT.

Decision of the District Court for the Southern District of New York in a case involving a violation of the Plant Quarantine Act of August 20, 1912 (37 Stat., 315).

SYLLABUS.¹

Under the plant quarantine act of August 20, 1912, the Secretary of Agriculture is vested not only with power to exclude potatoes, but to decide what shall be "due notice" and who are the "interested parties" to be notified as a preliminary to such exclusion.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF
NEW YORK.

UNITED STATES OF AMERICA

v.

299 BAGS OF POTATOES, MEYER ET AL., *Claimant*.

Libel of information, for condemnation of certain potatoes arriving in New York from Germany after the publication of the decision (or "determination") of the Secretary of Agriculture that these vegetables when imported from (among other countries) Germany, should be denied admission to the United States.

The right to deny admission is based on the "plant quarantine act" of August 20, 1912, and especially on section 7 thereof, and is admitted.

The Secretary "promulgated" his "determination" to exclude potatoes from certain countries, on the ground that the "potato wart" was prevalent therein, on September 28, 1912, after a "public hearing" on the subject held at Washington on September 20.

The statute (sec. 7) requires him to hold such hearing "after due notice to interested parties."

Claimants are wholesale grocers, long in the habit of importing potatoes from Germany, and it is admitted that they did not actually know of the aforesaid public hearing.

¹ Not by the court.

Their potatoes having been stopped and seized, they defend by asserting that the steps taken by the Secretary preliminary to the public hearing of September 20, did not amount to giving "due notice to interested parties;" wherefore the act is not yet applicable to potatoes, and the seizure consequently unlawful.

As matter of fact, very full notice was given to numerous steamship lines, a large number of customhouse brokers, practically all the newspaper correspondents living in Washington, many hundreds of newspapers published all over the country, and every State department or official having to do with agriculture.

Publication of the notice or fact of hearing was optional with the publications notified—the matter was news, not advertising.

At least two New York papers published the substance of the department's communication.

Mr. PRATT, assistant United States attorney, for the libel.

Mr. HAMILTON, for claimants.

HOUGH, D. J.:

In construing this act it is first to be remembered that "Congress from the beginning has exercised plenary power in respect to the exclusion of merchandise brought from foreign countries" (*Buttfield v. Stranahan*, 192 U. S., at 492) and might have forbidden German potatoes without any preliminaries whatever.

The question whether any given article of import shall or shall not be excluded is not in its nature of judicial investigation; it is political, in a wide but entirely proper sense of the word.

This being the case, and no provision being made in section 7 of the statute for any judicial review of the acts of the Secretary, it follows that the Department of Agriculture is vested not only with power to exclude potatoes, but to decide what shall be "due notice" and who are the "interested parties" to be notified, as a preliminary to such exclusion. This does not mean that any executive officer can act arbitrarily or in bad faith; such malfeasance in office may render his act void because unlawful, but a very wide discretion is lawfully vested in him, for the use of which he is responsible to Congress alone, though he may so abuse it as to subject his acts to judicial review. This is believed to be the substance of the doctrine of the alien cases, of which the Japanese Immigrant case, 189 U. S., 86, and *Turner v. Williams*, 194 U. S., 279, are perhaps the best known.

If this view be taken of the agreed facts, what the Secretary did falls far short of abuse of discretion. It is easy to point out that this or that additional effort might have been made, yet it was obviously impossible to reach every person who might thereafter be affected by the proposed exclusion of a common article of commerce, and since everyone was conclusively presumed to have knowledge

of the law itself, it can not be held unreasonable, and therefore an abuse of discretion, to give notice by informing the public prints of proposed action that would affect their readers or some of them.

If, however, this construction of the statute be too modern, no more stringent rule is or can be contended for than that the words "due notice to interested parties" show an intent to secure to the owners of potentially excluded potatoes that kind of notice which is one of the necessary elements of "due process of law."

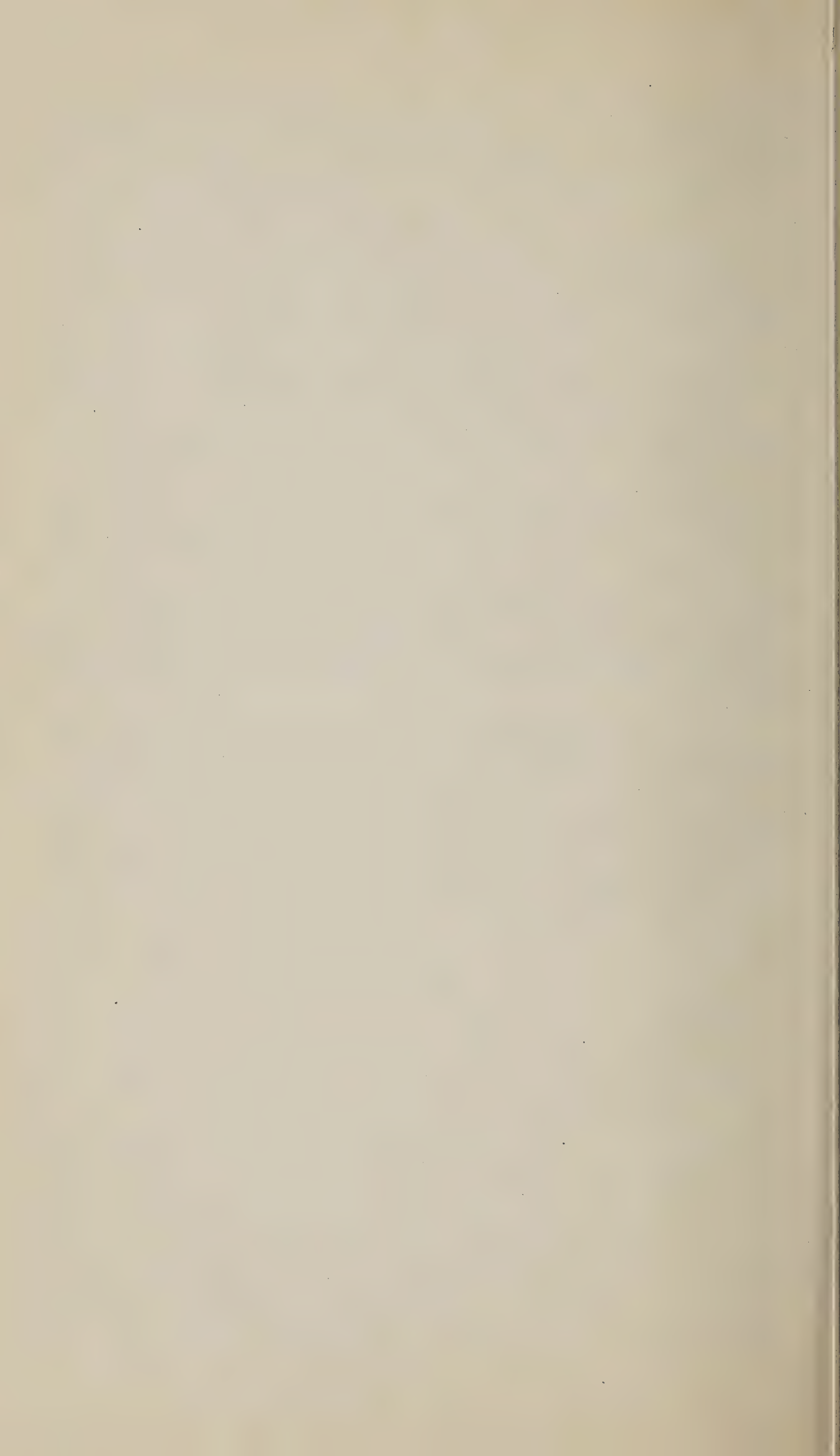
To this contention two lines of decision furnish a reply: (1) The act of Congress passed in the exercise of its undoubted power, is certainly to be viewed as favorably as are the statutes of a State, and the notice upheld in *Goodrich v. Ferris*, 214 U. S., 71, was far less efficacious than the one here complained of. (2) The object of a law is very important in determining its construction. This statute is intended to advance and maintain the health of plants themselves desirable if not indispensable for the health of man. Diseased potatoes obviously require at least as drastic measures for exclusion and destruction as do unlawful fish nets or inferior (though not unwholesome) tea (*Buttfield v. Stranahan, supra*; *Lawton v. Steele*, 152 U. S., 133, and compare the garbage cases, *California Reduction Co. v. Sanitary, &c., Works*, 199 U. S., 306; *Gardiner v. Michigan, idem.*, 325).

To prevent the spread of potato disease in the United States is an exercise of police power under the constitutional grant of power over commerce, and it is of the most obvious and laudable kind. Speed was necessary and summary action justifiable. The words "due notice" are to be interpreted in the light of these facts. In my judgment more and longer notice was given than was necessary.

Decree for libellant.

NOVEMBER 4, 1912.





United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 67.

GEO. P. McCABE, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Second Circuit, affirming the decision of the District Court of the United States for the Western District of New York, in a case involving a violation of the Twenty-eight Hour Law (Act of June 29, 1906; 34 Stat., 607).

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

Before LACOMBE, COXE, and WARD, Circuit Judges.

ERIE RAILROAD COMPANY, Plaintiff in error,

vs.

UNITED STATES OF AMERICA, Defendant in error. }

This cause comes here upon writ of error to review a judgment of the District Court, Western District of New York in favor of defendant in error, plaintiff below, after a trial by the court without a jury. The action was brought to recover a penalty on account of the alleged confinement of a shipment of cattle (four car loads) for a period of time in excess of 36 hours in cars which did not provide space and opportunity for the animals to rest.

LACOMBE, *C. J.*

The action is brought under the so-called 28 Hour Law of 1873 entitled "An Act to prevent cruelty to animals while in transit by railroad, etc," which provides that cattle, sheep, etc. shall not be confined in railroad cars for a longer period than twenty-eight consecutive hours (or upon written request of the owner thirty-six consecutive hours) without unloading the same in a humane manner into properly equipped pens for rest, water and feeding for a period of at least five consecutive hours. The cattle in this case were confined for sixty-five consecutive hours and the only question in the case arises upon the construction of the third section of the statute. This relieves the railroad from the obligation of complying with the provisions as to unloading—"when animals are carried in cars * * *

in which they can and do have proper food, water, space and opportunity to rest."

These animals were transported in cars specially arranged so as to secure to them, concededly, proper food and water. The number and weights of the cattle in each car are shown in the record. There is some dispute as to the space that a single animal would occupy when lying down, but that is immaterial because it is admitted in the brief of plaintiff in error, that in three out of four cars there was not space sufficient to allow all the animals to lie down at the same time. In one of the cars two animals would be left without sufficient space to lie down; in each of two other cars one animal would be in like condition. In the other car all could lie down at once; but the shipment is to be considered as a whole and if the law were violated in any single car of this shipment the penalty imposed by the statute would be incurred.

The only question in the case is whether the circumstance that all the cattle in a car cannot obtain rest by lying down at the same time will prevent a railroad from availing itself of the provisions of the third section, when the car is so large that if the movements of the cattle were regulated in some way, all of them might secure proper opportunity to rest at one time or another.

It seems to us that it is the object of the statute to secure to every animal in the shipment proper space and opportunity to rest. Not only is cruelty to a single one, "cruelty to animals", but the landing of a single one in a condition bad for slaughtering exposes the persons who may eat the meat from that one carcass to a risk which might not exist if this statute were strictly conformed to. Every animal in this shipment might have proper opportunity to rest if they all agreed to take turns in occupying space. But such agreement could not be brought about and, for aught that any one can tell, two or three or four cattle of this shipment may have been deprived of the opportunity to rest, even for the eight hours out of every twenty-four, which is the lowest period of rest contended for by the defendant. Our own impression from the testimony is that, if sufficient space were afforded, the cattle would, on such a journey as this, lie down for a much longer part of the twenty-four hours; and that considerably more than eight hours a day rest should be secured to every one of them.

The judgment is affirmed.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 68.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Supreme Court of the United States reversing decree of the Court of Appeals for the Third Circuit in a proceeding by way of libel for condemnation and forfeiture under section 10 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768).

SUPREME COURT OF THE UNITED STATES.

No. 590.—OCTOBER TERM, 1912.

FOUR HUNDRED AND FORTY-THREE CANS of Frozen Egg Product, H. J. Keith Co., Claimant, Appellant and Plaintiff in Error, <i>vs.</i> THE UNITED STATES OF AMERICA.	}	Appeal from and in error to the United States Circuit Court of Ap- peals for the Third Circuit.
---	---	---

[December 2, 1912.]

Mr. Justice DAY delivered the opinion of the court.

This case is here on both writ of error to and appeal from a decree of the Circuit Court of Appeals for the Third Circuit, reversing the judgment of the United States District Court for the District of New Jersey dismissing a libel brought by the United States which had for its object the condemnation of 443 cans of frozen egg product seized under the Pure Food Act of June 30, 1906 (34 Stat., 768).

The United States filed its libel alleging that 443 cans of frozen egg product, in the possession of the Merchants' Refrigerating Co., at Jersey City, New Jersey, consisted in whole or in part of a "filthy, decomposed, and putrid animal, to wit, egg substance," and praying for their condemnation. At the trial the issues were narrowed so as to exclude filthy and putrid substances, leaving the charge to stand as to decomposed substance. Three hundred and forty-two cans were seized. The H. J. Keith Co. appeared and claimed the goods, denying the charges concerning them. The case was tried without a jury to the district judge, who entered a decree dismissing the libel. The United States took an appeal to the circuit court of appeals, and, after

consideration in that court, the decree dismissing the libel was reversed and, upon the facts, a decree of condemnation in favor of the Government was entered. (193 Fed. Rep., 589.) The claimant, the H. J. Keith Co., thereupon appealed to this court, and also sued out this writ of error to the same decree.

We are met at the outset with a question of jurisdiction. Section 10 of the Pure Food Act provides:

That any article of food * * * that is adulterated or misbranded within the meaning of this act, and is being transported from one State * * * to another for sale, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

It will be observed that the last sentence of the section provides that "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States." The contention of the Government upon this question of jurisdiction is that the words, "conform, as near as may be, to the proceedings in admiralty," mean, except in cases where jury trial is demanded, to include appellate proceedings, as well as original proceedings in the district court, and therefore the review of the judgments of the district court would be by appeal to the circuit court of appeals, as in admiralty cases under the circuit court of appeals act (26 Stat., 826), and under the judicial code (36 Stat., 1087, 1133, sec. 128). If that is a proper construction of the statute, then the circuit court of appeals had the right to review the case upon the facts and enter a final decree, which, under the circuit court of appeals act and judicial code, would be reviewable here only upon writ of certiorari.

The appellant, also plaintiff in error, contends that the seizure being upon land, the proceeding was at law and reviewable only upon writ of error in the circuit court of appeals; that the attempted appeal did not give the circuit court of appeals jurisdiction, and that upon the writ of error here this court should reverse the judgment and remand the case to that court with directions to dismiss the appeal.

The determination of this controversy requires some examination of previous legislation and of the decisions of this court interpreting such legislation as to the nature and extent of the jurisdiction of the district courts of the United States in seizure cases.

The judiciary act of 1789 (1 Stat., 76, sec. 9) gave to the district courts:

Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of 10 or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it; and * * * also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.

In the case of *The Sarah* (8 Wheat., 391), a libel was filed against 422 casks of wine alleging a forfeiture by false entry. It appearing in the course of the trial that the seizure was made on land, it was held that this court could not review the case save upon writ of error. Chief Justice Marshall, delivering the opinion of the court, said (p. 394):

By the act constituting the judicial system of the United States, the district courts are courts both of common law and admiralty jurisdiction. In the trial of all cases of seizure, on land, the court sits as a court of common law. In cases of seizure made on waters navigable by vessels of 10 tons burthen and upwards, the court sits as a court of admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled, in the cases of *The Vengeance* (reported in 3 Dallas' Rep., 297); *The Sally* (in 2 Cranch's Rep., 406); and *The Betsy and Charlotte* (in 4 Cranch's Rep., 433), that the trial is to be by the court.

Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended than a court of chancery with a court of common law.

A statute, practically the same, with some slight changes, was embodied in section 563 of the Revised Statutes, subdivision 8, giving the district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction * * * and of all seizures on land and on waters not within admiralty and maritime jurisdiction," the subdivision mentioned omitting the provision found in the section of the judiciary act of 1789 to which we have referred as to seizures "within their respective districts," and including cases of "seizures on land and on waters not within admiralty and maritime jurisdiction." Under this statute it has been uniformly held that the district court as to seizures on land proceeds as a court of common law with trial by jury and not as a court of admiralty. (*United States v. Winchester*, 99 U. S., 372.)

Questions analogous to the one here came before this court in construing the confiscation acts enacted in 1861 and 1862. This

court, in *Union Insurance Co. v. United States* (6 Wall., 759), construed the act of Congress of August 6, 1861, entitled "An act to confiscate property used for insurrectionary purposes." That act provided for the seizure of such property and its condemnation in the district or circuit court having jurisdiction of the amount, or in admiralty in any district in which the property might be seized, and authorized the Attorney General to institute proceedings of condemnation. In that case it was held that in the condemnation of real estate or property on land the proceedings were to be shaped in general conformity to the practice in admiralty, but in respect to trial by jury and exceptions to evidence the proceedings should conform to the course of proceeding by information on the common-law side of the court. It was held that where proceedings for the forfeiture of real estate were had in conformity with the practice in courts of admiralty they could not be reviewed in this court by appeal, and that the case could come here only for the purpose of reversing the decree and directing a new trial.

In the case of *Morris's Cotton* (8 Wall., 507), this court had under consideration the acts of 1861 and of July 17, 1862, which act provided (12 Stat., 589, 591, sec. 7) for the institution of proceedings in the name of the United States in any district court, etc., where the property might be found, etc., "which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases." In the *Morris* case it was said:

Where the seizure is made on navigable waters, within the ninth section of the judiciary act, the case belongs to the instance side of the district court, but where the seizure was made on land, the suit, though in the form of a libel of information, is an action at common law, and the claimants are entitled to trial by jury.

Seizures, when made on waters which are navigable from the sea by vessels of 10 or more tons burden, are exclusively cognizable in the district courts, subject to appeal, as provided by law; but all seizures on land or on waters not navigable, and all suits instituted to recover penalties and forfeitures incurred, except for seizures on navigable waters, must be prosecuted as other common-law suits, and can only be removed into this court by writ of error.

This jurisdiction of the district court was known to Congress at the time it passed the Pure Food Act, as were the decisions of this court construing the former acts of Congress, and it declared that such proceedings shall conform to those in admiralty, as near as may be, giving to either party, however, the right to demand a trial by jury in case of issues of fact joined. We think this act must be held to have been passed not to confer a new jurisdiction upon the district court, but in recognition of the jurisdiction already created in seizures upon land and water. The act makes no reference, in conforming the proceedings as near as may be to those in admiralty, to

appellate procedure. It leaves that to be determined by the nature of the case and the statutes already in force. It is true that the right of trial by jury is preserved, where demanded by either party. We think Congress inserted this provision with a view to removing any question as to the constitutionality of the act. It was held under the confiscation acts, although no such specific provision is contained, that the action provided was one at common law, with a right to trial by jury. The seventh amendment to the Constitution preserves the right of trial by jury in suits at common law involving more than \$20, and provides that no fact tried by a jury shall be reviewed otherwise than according to the rules of the common law. Having in mind these provisions and as well the construction of the previous acts, we think it was the purpose of Congress to leave no doubt as to the right of trial by jury in the law proceeding for condemnation which the act intended to provide.

These proceedings for the seizure and condemnation of property which is impure or adulterated are intended to be in a sense summary, and yet the statute as we have construed it gives the owner a right to a hearing in a court of record with a right of review upon questions of law by writ of error in the circuit court of appeals, and, where more than \$1,000 is involved, finally in this court (sec. 6 of the circuit court of appeals act). It is to be noted in this connection that where the examination of specimens of food or drugs made by the Department of Agriculture shows that the articles are adulterated or misbranded, the parties from whom the specimens were obtained are (sec. 4 of the act) given a hearing before the matter is certified to the district attorney by the Secretary of Agriculture.

We do not think it was intended to liken the proceedings to those in admiralty beyond the seizure of the property by process *in rem*, then giving the case the character of a law action, with trial by jury if demanded and with the review already obtaining in actions at law. It is true that, if the action is tried in the district court without a jury, the circuit court of appeals is limited to a consideration of such questions of law as may have been presented by the record proper, independently of the special finding. *Campbell v. United States* (224 U. S., 99). But the party on jury trial may reserve his exceptions, take a bill of exceptions, and have a review upon writ of error in the manner we have pointed out.

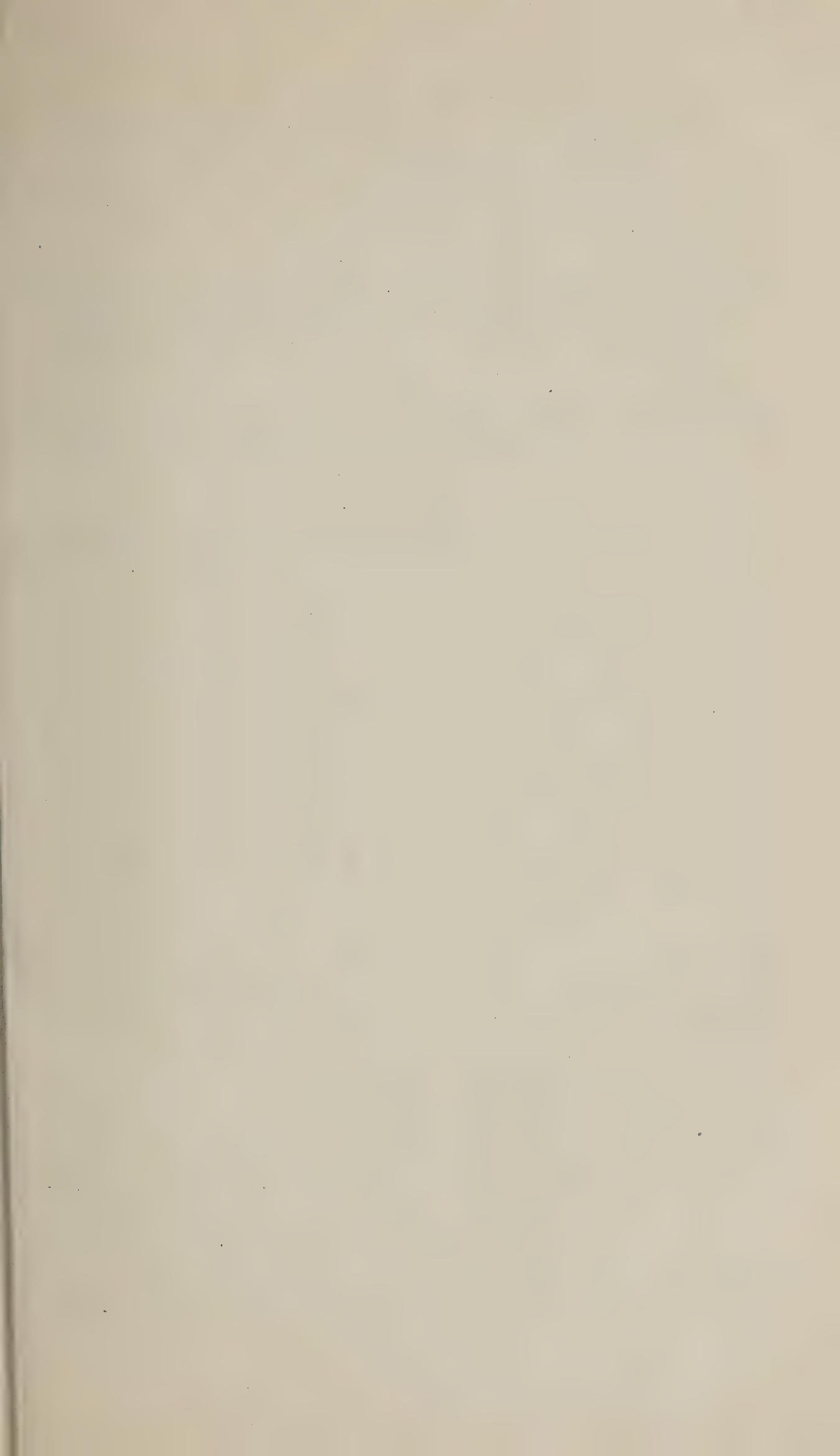
It is insisted for the Government that inasmuch as the hearing in the circuit court of appeals upon appeal was without objection by the claimant, the jurisdictional objection was waived. We can not take that view. As we construe the statute, the circuit court of appeals had no jurisdiction upon the appeal, and neither the action of the court nor the consent of the parties could give it. (*Leo Lung*

On *v. United States*, 159 Fed. Rep., 125; *Jones v. La Vallette*, 5 Wall., 579; *United States v. Emholt*, 105 U. S., 414; *Perez v. Fernandez*, 202 U. S., 80, 100.)

As the circuit court of appeals, in our opinion, proceeded without jurisdiction by reason of the appeal, this court, having acquired jurisdiction, should reverse the judgment of the circuit court of appeals and remand the case to that court with instructions to dismiss the appeal for want of jurisdiction. (*Union & Planters' Bank v. Memphis*, 189 U. S., 71.)

Judgment accordingly.





United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 69.

GEO. P. McCABE, Solicitor.

NATIONAL FORESTS CAN NOT BE OCCUPIED BY DITCHES AND CANALS FOR IRRIGATION WITHOUT PERMISSION FROM PROPER OFFICERS OF THE GOVERNMENT.

Decision of the District Court of the United States for the District of Colorado sustaining the authority of the Government to prevent the unauthorized use and occupation of National Forests.

By decision of November 25, 1912, the District Court of the United States for the District of Colorado, in the case of *United States v. Henrylyn Irrigation Co. and others*, overruled the defendants' demurrer to the plaintiff's bill of complaint praying for an injunction to restrain the defendants from constructing without permission of the proper officers of the Government certain canals and tunnels over lands of the United States in the Arapaho and Pike National Forests, Colorado, intended for use in connection with a proposed irrigation project. The defendants had applied to the Secretary of the Interior for a grant of a right of way for these canals and tunnels under sections 18 to 21, inclusive, act of March 3, 1891. (26 Stat., 1095.) For reasons appearing in the opinion of the court, which is set forth in full in this circular, the application was not approved, but the defendants nevertheless proceeded with the construction of the proposed works. Suit for an injunction was accordingly brought, and to the Government's bill of complaint the defendants filed a demurrer alleging that the Government's case was not sufficient to justify an injunction, and contending, among other things, that the approval of the executive branch of the Government is not necessary to the acquisition of a right of way over a National Forest; that an injunction is not the proper method of arresting the construction without such approval of the proposed irrigation project; that the Government had improperly delayed or refused to consider the application of the defendants in the interest of one of its own projects, namely, the Grand Valley Irrigation Project.

The following is the substance of the decision:

1. A right of way for an irrigation project can not be acquired over a National Forest without the approval of the proper executive

officers, nor can any occupancy or use of National Forests be made except by permission of the proper officials of the Government.

2. The Government may obtain an injunction against the unauthorized use of the National Forests for canals and tunnels, since such use tends to a burden upon the estate. No court would deny equitable relief to a private owner who alleged that, without his consent, his realty was about to be burdened with a system of canals and tunnels, and if a private owner might ask this, it would seem even more clear that the Government may do so, since it is not only the owner but the sovereign as well. (*United States v. Cattle Co.*, 33 Fed., 323, 330.)

3. The alleged improper delay or refusal of the executive officer having jurisdiction in the matter to consider an application for a right of way does not justify the prosecution of the work without such approval, or, in other words, preclude the Government from maintaining a bill in equity to prevent such construction in advance of approval.

4. Even if the Secretary of the Interior refused to consider the defendants' application in order to advance thereby the interests of the Government in the Grand Valley Reclamation Project, this would not debar the Government from relief against an invasion of its property rights.

5. Where an executive officer improperly omits to exercise a discretion, he may be required by mandamus to proceed to its exercise, but the court can not be called upon to exercise a discretion reposed in another branch of the Government.

6. To refuse an injunction to the Government in this case would be to deny to it the right to control the manner in which the National Forests shall be used, although this right was expressly reserved to it by law.

The following is the opinion of the court:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF
COLORADO.

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

THE HENRYLYN IRRIGATION COMPANY, THE
Inter-Mountain Water Company & J. A.
McIlwee, defendants.

No. 5791. In equity.

POPE, District Judge:

The Government's bill shows a case wherein defendants are proceeding to construct canals and tunnels for an irrigation project over the public domain as contained in the Arapahoe and Pike National Forest Reserves in the State of Colorado. Proceeding principally upon the ground that no right of way has been as yet approved for the enterprise, either by the Secretary of Agriculture or the Secretary of the Interior, an injunction is sought to prevent any further entry upon or prosecution of the work over the two reserves named. The bill shows that applications for the right of way were presented to the Interior Department some two years since, but that no action has been taken thereon. In explanation of the failure of the Secretary of the Interior to act, the bill contains the following averments:

Plaintiff avers that the validity of the claim of water rights made as aforesaid by the water company and irrigation district, and particularly their claim of right to divert water away from the watershed of the said Grand River and to apply, use, and consume the same east of said Continental Divide, in the watershed of the South Platte River, and particularly their claim of right to appropriate and use as much as seven hundred cubic feet per second of the water flowing in said tributaries of "Williams Fork," with a priority dating from the 15th day of May, 1902 (which date plaintiff avers is the date to which they assert their said alleged or pretended water right will relate when perfected by the application of the water so claimed by them), are matters which now and ever since a time prior to the filing of said application have been in issue in a certain action pending in the District Court of the First District of the State of Colorado, wherein the Grand Valley Irrigation Company and numerous other corporate and individual claimants of rights to the use of waters from the said Grand River and its tributaries are plaintiffs and the water company and others are defendants; that a number of other applications for rights of way across national forests for the diversion of water flowing in tributaries of the said Grand River and contemplating and intending the use of all such water at places remote from the valley and watershed of said Grand River have been filed and are now pending in the General Land Office, and others, as plaintiff is informed and believes, are about to be there filed in the near future; that the aggregate quantity of water which the said several existing and prospective applicants claim rights to divert and use, as aforesaid, is so large and the several priorities conditionally claimed by said several and prospective applicants are of such dates that if all such claims were sustained and upheld as legally and lawfully made and water were diverted and applied as aforesaid in accordance therewith, the result, in all probability, would be to diminish the supply of water flowing in the said Grand River to such an extent as to work great injury and deprivation to numerous water claimants and water users who claim rights to use the water of the said river and its tributaries for the irrigation of lands situate within the valley of the said river and assert and believe that their rights in that behalf are superior in law and prior in time to the rights claimed by the said defendants and other actual and prospective applicants for such rights of way; that among the persons so injured and deprived would be the numerous water users under the Grand Valley reclamation project—a project duly approved under and in pursuance of the act of June 17, 1902, commonly called the reclamation act, in behalf of which project the plaintiff claims to have appropriated 1,200 cubic feet per second of the water of the said Grand River as of July, 1902. Said project involves and demands the construction at great expense of divers canals and other waterworks, is now in course of execution, and will, upon the completion of said canals and waterworks, bring under irrigation upward of 53,000 acres of fertile land lying within the valley of the said Grand River, and requiring for their proper irrigation and cultivation the full quantity of water which the plaintiff so claims to have appropriated under and on behalf of said project.

On or about February 3, 1911, the Secretary of the Interior, in view of the number of said actual and prospective applications for rights of way, the large quantities of water proposed to be thereby diverted, as aforesaid, the pendency of the said litigation, and the serious issues therein involved, as aforesaid, and being apprehensive lest the approval of such actual and prospective applications (including the said application of the said irrigation district) by him might result in the wrongful and unlawful diversion away from the watershed of the said Grand River, in violation of just and prior rights of the plain-

tiff and the said water users under said reclamation project, of large quantities of water essential to the success of said project and to the proper irrigation of the lands of said water users thereunder, and to the end that he might cause further and more exhaustive inquiry to be made than has heretofore been made into and concerning the water run-off within said watershed, the nature and extent and validity or invalidity of the several claims of water rights made by the said defendants and other said applicants and prospective applicants for rights of way, and the aggregate quantity of water likely to be diverted by all such applicants and prospective applicants, should their applications be approved, ordered and directed the Commissioner of the General Land Office not to submit to him, the said Secretary of the Interior, for approval or disapproval, any of such applications until he, the said Secretary, had made such further inquiry and gained such fuller information as would enable him to pass upon the same and each thereof with due regard to the rights of all persons so applying, as well as the public interests, and particularly the rights of the plaintiff and the said water users under the said reclamation project.

The said order and direction is still in full force and effect, and, by reason thereof, the said application of the irrigation district has not as yet been presented to the Secretary of the Interior for approval or disapproval. Plaintiff, however, avers that the irrigation district has especially petitioned the Secretary of the Interior directly for a modification in its behalf of his said order and direction of February 3, 1911, to the end that its said application for right of way may be relieved from said order and direction and be now considered upon its merits, and has made arguments and filed briefs in support of the said petition; and that the said petition is now pending before and under consideration by the said Secretary, but has not as yet been granted, denied, or otherwise acted upon by him.

The demurrer challenges the sufficiency of the Government's case as stated to justify an injunction. The argument and the briefs disclose the following contentions:

First, is the approval of the executive branch of the Government necessary to acquiring a right of way over a forest reserve?

Second, is injunction the proper method to arrest the creation without such executive approval of a tunnel and irrigation canals for irrigation purposes over such a reserve?

Third, does the improper delay or refusal of the executive officer charged with approving such application for a right of way to consider such application justify the prosecution of the work without such approval, or what is the same in practical results, does it preclude the maintenance of a bill in equity to prevent such building in advance of approval?

These questions may be briefly answered:

(1) As to the first it seems evident from the course of legislation affecting forest reserves that executive approval is necessary to the creation of irrigation enterprises thereon. Indeed defendants tacitly admit this, in that they have applied for such approval. It does not seem necessary to quote or review in detail the various acts which converge to this result. Beginning with the act of March 3, 1891 (26 Stat., 1095), and extending to that of February 1, 1905 (33 Stat., 628), the legislative intent is manifest that as to these reserves, created as they are for a special purpose, no occupancy nor use thereof by private parties shall be permitted save upon the exercise of a discretion by the proper departments as to whether such use will interfere with the purposes of such reserve. (*U. S. v. Lee*, 110 Pac., 607.)

(2) Nor do we see any reason why injunction is not available to the Government as a remedy rather than the slow process of a suit at law to eject. The

wrong is in the process of the doing. If it tends to a burden upon the estate, the arrestive hand of equity may be invoked to prevent its consummation. We believe that no court would deny equitable relief to a private owner who came in alleging that his realty was, without his consent, about to be burdened by another with a system of canals and tunnels. If a private owner might ask this, it would seem even more clear that the Government may do so. It is not only the owner, but the sovereign. (*U. S. v. Cattle Co.*, 33 Fed., 323, 330.)

(3) It is said, however, that the bill discloses that the consideration of defendants' application for a right of way is being postponed in the interest of the Grand River reclamation project, a Government enterprise, and that the delay by the Secretary of the Interior is in order that defendants may lose their status as appropriators under the Colorado law, and that their rights, now superior to that of the Grand River project, may by delay be rendered junior thereto. It is said that the Government is thus a party to, indeed the perpetrator of, a fraud: does not come into court with clean hands, and is thus precluded from any relief. But we do not understand that the doctrine asserted can debar the Government from relief for an invasion of its proprietary rights. As sovereign it can in legal contemplation do no wrong. This being a Government of law, the acts of its officers cease to be its acts when they become unlawful. If such officers omit a duty, the courts are open to require them by mandamus to perform it. In the present instance, if the Secretary of the Interior has improperly omitted to exercise a discretion, he may be required to proceed to its exercise. But that is a very different matter from that here contended for. It seems to be here insisted that because he has failed to act, therefore the court should in effect act for him; that because he has not exercised a discretion imposed by law, therefore the court should itself exercise that discretion. We can not, however, accede to any such view. A court can not thus be called upon to exercise a discretion reposed in another branch of the Government. It is true that if defendants' position be sustained, this result will be reached simply by the court's non-action rather than affirmatively. But the result is the same. In either event it will be to deny the Government the right to control the manner in which its domain, created into forest reserves, shall be used—a right in my judgment reserved to it by law. If this method of administering the public domain be obstructive to public enterprise or oppressive to the citizen, the remedy is elsewhere than in the courts, and must be sought from Congress. It has, of course, not been deemed necessary to the present case to intimate, much less decide, how far, if at all, the delay complained of has been unwarranted by law and a proper discharge of duty by the Secretary of the Interior, nor does the present case call for any consideration of the momentous question, somewhat discussed in the briefs, of the title of the State as against the General Government to the unappropriated waters within its borders.

The demurrer will be overruled, the defendants to answer within thirty days. Wherefore,

This cause having been heretofore submitted to the court upon the demurrer to the bill of complaint filed herein, and the court being sufficiently advised in the premises,

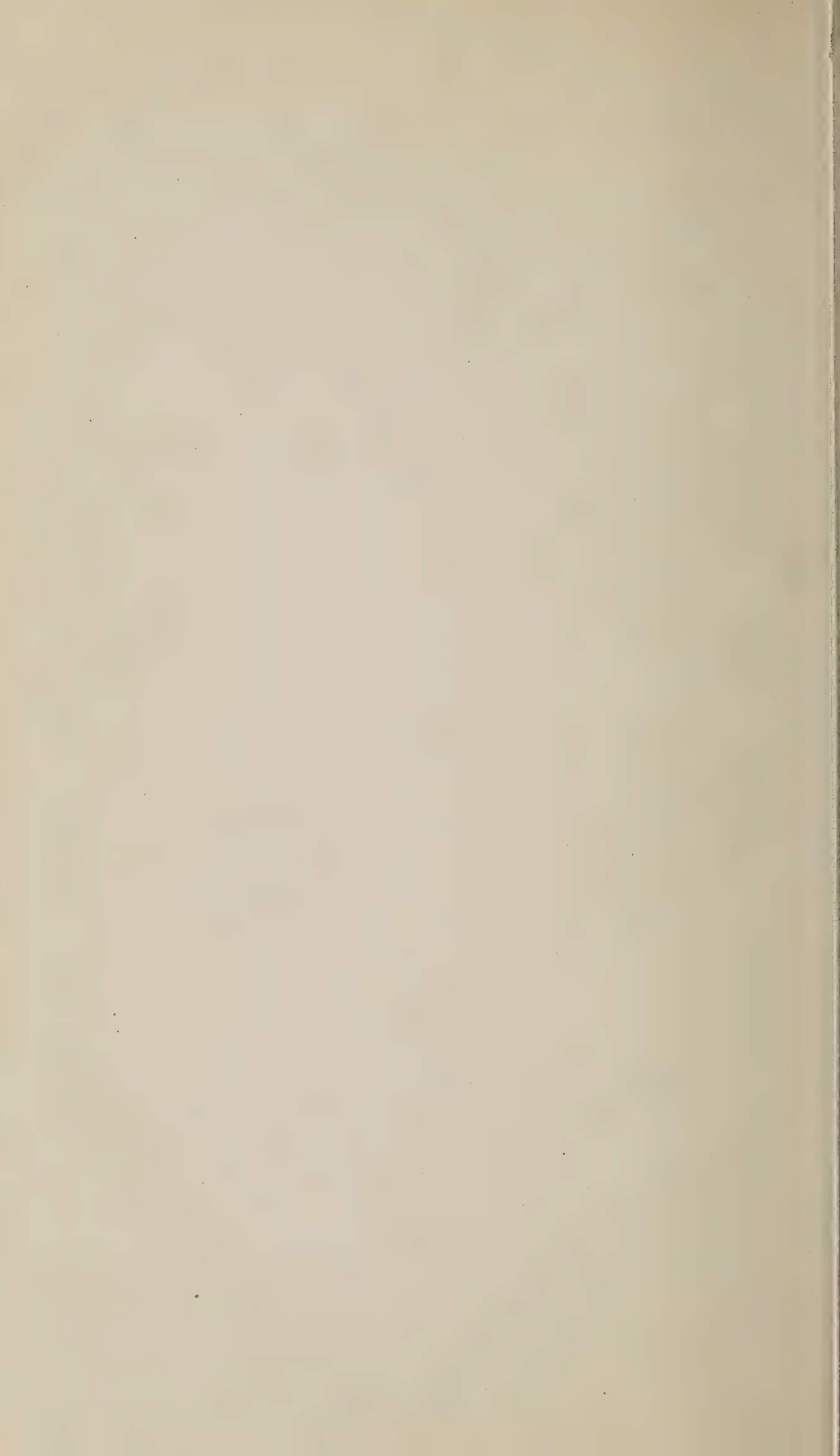
It is ordered that said demurrer be, and the same is hereby, overruled; to which ruling of the court the defendants duly except.

It is further ordered that defendants answer herein within thirty days from this date.

NOVEMBER 25, 1912.

[Cir. 69]





MAR 5-1913

Issued March 3, 1913.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 70.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Court of Appeals of the District of Columbia Affirming the Decree of the Supreme Court of the District of Columbia in a Proceeding by Way of Libel for the Condemnation and Forfeiture of Adulterated Flour under Section 10 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768).

SYLLABUS.¹

1. The purpose of Congress in the enactment of the Food and Drugs Act, June 30, 1906, was the better protection of the people of the United States from adulterated or deleterious foods, drugs, medicines, and liquors. It is the duty of the court, in interpreting such statutes, to keep constantly in mind the legislative intent, the evils sought to be overcome, and, if possible, to give substantial force and effect to that intent. A liberal and reasonable construction should be given to such statutes in view of their remedial objects and purposes, so as to effect the same.

2. Whether a sample is fairly representative of the whole is a preliminary question to be decided by the trial court, and the decision then reached will not be revised in an appellate court unless the facts producing it are before that court—and then only when error clearly appears.

It is proper to assume that if the appellants could have presented evidence to show that the sample was not representative of the two lots of flour seized they would have done so.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

HARRIET T. GALT AND RALPH L. GALT, COPARTNERS, trading under the firm name of William M. Galt & Company, Appellants,	} No. 2427.
v.	
UNITED STATES OF AMERICA.	

This is an appeal from a decree in the Supreme Court of the District condemning 447 sacks of "Princess Flour" and 72 sacks of "Fancy Melba Patent" flour, under a libel filed by the United States through its attorney in and for the District of Columbia. The libel sets forth the possession by the appellants within this District of "Three hundred and fifty sacks, more or less, of

¹ Not by the court.

flour labelled 'Princess Flour from Blanton Milling Co., Indianapolis, Ind.'; and further, fifty sacks, more or less, of flour labelled '140 lbs. Fancy Melba's Patent—Trade Mark Registered—From Choice Hard Wheat, Majestic Flour Manufacturing Co., U. S. A., Distributors'".

As originally filed the libel alleged that said flour was both adulterated and misbranded, in violation of the Pure Food Act of June 30, 1906, (34 Stat. 738). This averment was superseded by another which set forth that said flour is, "adulterated within the meaning and intent and in violation of the said Act of Congress approved June thirtieth, A. D. 1906, and that the said flour consists in part of a filthy, decomposed and putrid animal and vegetable substance." Appropriate answer was filed and, a jury being waived, testimony was taken in open court, the parties agreeing that the court might "find the facts and declare the law applicable thereto and render judgment accordingly." The court filed a written opinion which "was treated and considered by both court and counsel as the court's finding of facts as aforesaid." Thereupon the case was appealed to this court, the parties, according to the stipulation filed herein, "taking and considering the said opinion as and for such finding of facts."

The evidence which was before the trial court and upon which the decree is based is not in this record, and hence not before us. Searching the opinion of the trial court, we learn that the Government on two occasions, permission of the court first having been obtained, took two sacks of flour "one from each of said *two lots* described, for the purpose of examination and analysis." Appellants were granted the same privilege, but did not exercise it. We now quote from the opinion: "The result of the examination of the flour sacks taken by the government as samples, was that one of them contained worms, insects, and beetles, aggregating 3525, and the other three, worms, insects, and beetles, aggregating 1207, 1448, and 1959, respectively.

Experiments were made by the Department of Chemistry, showing that the said flour contained a large number of bacteria that were supposed to be injurious to the human body; and, in addition, to the worms, insects and beetles, that had been sifted out of the flour, the evidence showed that there remained in the same, cases or husks made by the worms, as well as the excreta from them, all of which, it was claimed, rendered the said flour filthy within the meaning of said Act.

There were a great many weevils discovered, and they were defined as the grain weevil, or wingless insects, which require a period of some six weeks, in warm weather, for full growth and development, during which time they pass through four distinct stages of existence, first in the form of the egg, then the form of the larva, then in the pupa form, and finally reaching the adult form; and that after

maturing, these insects might live for several months, and possibly for a year. In cold weather a longer time was necessary for their growth.

That the beetle known as 'flour beetle,' comes from a larva, or worm, about half an inch long, and it breaks in flour and grain. Several of these beetles, in the larva state, and in the adult state, appeared to be in said samples.

The evidence was that the flour was injuriously affected by the presence of such worms, insects, and beetles, by reason of their feeding on the gluten, and thereby destroying the strength and value of the flour, and rendering it unfit for making bread, or other domestic use, even if the foreign, filthy matter could be bolted or sifted out of it."

The court further found that it is not clear whether weevils may not come into flour while in storage, without any fault of the owner. Speaking of the sacks of flour here involved, the court said: "It appears that the flour sacks taken were from different locations in the several piles of sacks, and it is argued on behalf of the government, that all the sacks seized were in a position to become affected by the dirt and filth from a stable nearby." The court finally found "as matter of fact from the evidence that the said several sacks of flour are in a filthy condition, under the provisions of said Act, by reason of the presence of the said worms, insects, and beetles, in such quantities as shown, and from the condition which they have produced in the said flour."

The so-called Pure Food Act is entitled "An Act for Preventing the Manufacture, Sale, or Transportation of Adulterated or Misbranded or Poisonous or Deleterious Foods, Drugs, Medicines, and Liquors," etc. Section 7 defines adulteration of foods and drugs, respectively, as follows: In the case of drugs (1) if a drug differs from the standard strength, quality or purity, unless the actual standard be plainly stated upon the box or other container; (2) if its strength or purity fall below the professed standard or quality under which it is sold. In the case of confectionery, which the Act defines as a food, if it contains any mineral substance or poison, color, or flavor, or other ingredients deleterious or detrimental to health, etc. In the case of food generally (1) if any substance has been mixed or packed with it so as to lower or injuriously affect its quality or strength; (2) if any substance has been substituted wholly or in part for the article; (3) if any valuable constituent of the article has been wholly or in part abstracted; (4) if it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed; (5) if it contain any added poisonous ingredient which may render such article injurious to health; (6) *if it consists*

in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Section 8 of the Act covers misbranding. It is provided therein that no label shall bear any statement, design or device "which shall be false or misleading in any particular."

A most casual reading of this Pure Food Act discloses that the purpose of Congress in its enactment was the better protection of the people of this country from adulterated or deleterious foods, drugs, medicines and liquors. It is the duty of the court, in interpreting such statutes, to keep constantly in mind the legislative intent, the evils sought to be overcome, and, if possible, to give substantial force and effect to that intent. *United States vs. Corbett*, 215 U. S. 233; *United States vs. Cella*, 37 App. D. C., 423. "It is the settled doctrine of this court," said Mr. Chief Justice Shepard in the *District of Columbia vs. Gardiner*, present term, "that a liberal and reasonable construction shall be given these statutes in view of their remedial objects and purposes so as to effect the same."

The first contention of appellants in the present case is that the Act makes a distinction between adulteration which consists in adding to an article that which is not properly a part of it, and adulteration existing when some part of the article itself is not what it ought to be; in other words, "when some part of the article, whether animal or vegetable, *is* filthy, decomposed, or putrid—not that the article *contains* a substance of that character foreign to its proper ingredients or constituents." In view of the finding of the court that the presence of worms, insects and beetles in the condemned flour have produced a filthy condition thereof, it is unnecessary to determine whether appellant's contention is well-founded. Aside from the fact that the evidence from which this finding was made is not before us, it is matter of common knowledge that the presence of such a large number of worms, insects and beetles in such a substance as flour would render the flour filthy in the general acceptance of that term. This flour was not to be fed to swine, but was to be sold for human consumption. Even conceding that the worms, insects and beetles could be separated therefrom, the flour would still be contaminated by reason of its contact with them, and it would still contain more or less husks and excreta from the worms—that is, it would still be filthy within the meaning of the act.

Appellants further contend that there was no evidence of the condition of the flour actually condemned by the decree. Of course, it is not contended that it was necessary for the Government to examine each of the large number of sacks of flour seized. The real conten-

tion, therefore, is that the samples examined were not representative of those remaining. 35 Cyc. 701 defines a sample as "that which is taken out of a large quantity as fairly representative of the whole." Whether a sample is fairly representative of the whole is a preliminary question to be decided by the trial court, and the decision then reached will not be revised in an appellate court unless the facts producing it are before that court—and then only when error clearly appears. *Brown vs. Leach*, 107 Mass. 367. Of course, the situation may be such as to warrant the trial court in submitting this question to the jury. *Lake vs. Clark*, 97 Mass., 347: In *Origet vs. Hedden*, 155 U. S. 228, the point was made that the appraisers had examined certain cases only, out of two importations of a large number of cases of lace. The court said: "If there was a difference between the goods in the different cases of either importation, it is singular that the invoices are not set forth in the record. The inference is a reasonable one that they showed the goods in each importation to be of the same character and value, so that the examination of one case would be sufficient for all. There is nothing to indicate the contrary." The cases relied upon by appellants involved facts materially different from the facts in the present case, and in no way qualify the general rule previously stated.

Upon this branch of the case, the trial court found: "Considering *the testimony as presented*, and the absence of testimony on behalf of the claimants, the court is forced to the conclusion that if other samples had been taken and analysed, their examination would have shown similar conditions to those in the four sacks actually examined." The court further pertinently observed that, if the claimants could have shown to the contrary, it might be assumed they would have introduced evidence. It further appears from said opinion that the samples taken were "from each of said *two lots* described," and it further inferentially appears that all the sacks seized "were in a position to become affected by the dirt and filth from a stable nearby." In view of what appears in the court's opinion as to the conditions surrounding the storage of this flour, the conclusion reached by the court from the testimony presented by the Government—which testimony is not before us—and the failure of the claimants to present any evidence upon the point, we are clearly of the opinion that the samples examined must now be presumed to have been fairly representative of the two lots of flour. The decree will therefore be affirmed and with costs.

Affirmed.

CHAS. H. ROBB,
Associate Justice.

Issued March 21, 1913.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 71.

GEO. P. McCABE, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the United States Circuit Court of Appeals for the Eighth Circuit reversing judgment of the District Court of the United States for the Western District of Missouri in a proceeding by way of libel for condemnation and forfeiture under section 10 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768).

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 3533.—December Term, A. D. 1912.

LEXINGTON MILL & ELEVATOR COMPANY, Claimant, Plaintiff in Error,	} In error to the District Court of the United States for the Western District of Missouri.
<i>vs.</i> UNITED STATES OF AMERICA, DEFENDANT in Error.	

No. 3534.—December Term, A. D. 1912.

LEXINGTON MILL & ELEVATOR COMPANY, Claimant, Appellant,	} Appeal from the District Court of the United States for the Western District of Missouri.
<i>vs.</i> UNITED STATES OF AMERICA, APPELLEE.	

Mr. Edward P. Smith and Mr. E. L. Scarritt (Mr. Bruce S. Elliott, Mr. A. E. Helm, Mr. C. J. Smyth, and Mr. W. C. Scarritt were with them on the brief) for plaintiff in error and appellant.

Mr. Leslie J. Lyons, United States Attorney, and Mr. Pierce Butler, Special Assistant Attorney General (Mr. William G. Graves was with them on the brief), for defendant in error and appellee.

Before Sanborn, Circuit Judge, and Wm. H. Munger and Marshall, District Judges.

Proceedings by the United States of America to forfeit six hundred and twenty-five sacks of flour—Lexington Mill & Elevator Company, claimant. Trial was had to a jury and verdict rendered in favor of the United States. From the judgment entered thereon, the claimant brings error and appeal.

MARSHALL, District Judge, delivered the opinion of the court.

The Lexington Mill and Elevator Company is a corporation of the State of Nebraska and is engaged in the manufacture of flour at Lexington, Nebraska. On April 1, 1910, it shipped from Lexington to B. O. Terry at Castle, Missouri, six hundred and twenty-five sacks of flour manufactured by it. On April 9, 1910, a libel was filed by the United States under the provisions of Sec. 10 of the Food and Drugs Act, 34 Stat. 768, and a warrant of seizure issued, by virtue of which the flour was seized under the claim that it was adulterated and misbranded in violation of the provisions of that Act. The Lexington Mill & Elevator Company appeared as claimant. It averred that it had sold the flour under a guarantee that it was not adulterated within the meaning of the Food and Drugs Act, and that pursuant to that guarantee it had furnished to the purchaser other flour in lieu of that seized, and had become the owner of the flour in litigation. It was permitted to answer the libel and the case was then tried to a court and jury with the result that the United States had a verdict that the flour was adulterated and misbranded. From the judgment of condemnation rendered on this verdict the claimant prosecutes an appeal and a writ of error. A motion is made to dismiss the appeal and this must be sustained.

The act under which this libel was filed provides in Sec. 10 for the process of libel for condemnation and that "The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand a trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States." This did not change the essential character of the action or make it other than an action at law. As a matter of procedure it has to conform "as near as may be to proceedings in admiralty", but a trial by jury at the demand of either party is provided, and a review of the facts so tried by appeal was not expressly granted. The question as to the proper method of review was decided in this Court in the case of *United States v. Seven Hundred and Seventy-nine Cases of Molasses* (174 Fed. 325). The Supreme Court of the United States has had occasion to pass on the principle involved in cases arising under the

Act of July 17, 1862, entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes", which provided that the proceedings against the property seized shall be *in rem* and "shall conform as nearly as may be to proceedings in admiralty or in revenue cases." That court held that a writ of error was the only method of review. The appeal in No. 3534 will be dismissed and jurisdiction will be taken of the writ of error in No. 3533.

Before a consideration of the questions arising on the writ of error a more complete statement of the facts is necessary. The claimant in the manufacture of the flour seized uses the Alsop patented process. A complete description of this process may be found in the opinion of this Court in *Naylor v. Alsop Process Co.* (168 Fed. 911). It is sufficient for the present purpose to say that by it nitrogen peroxide gas is formed by electric discharges. This gas mixed with air is brought into contact with the freshly milled flour, with the result of bleaching it. The method is this; in a small chamber one electrode is fixed; the other is given a reciprocating motion so as to alternately touch and separate from the fixed electrode. A current of high potential is used. The circuit is completed by the contact. Separation of the electrodes results in an arc. The inert nitrogen of the air is oxidized and nitrogen peroxide gas formed. This gas diluted by mixture with air is conveyed to a box or agitator, through which the flour is permitted to fall and the bleaching is at once effected. The chemical reaction seems to be as follows: The nitrogen peroxide gas coming in contact with the moisture of the flour, splits and forms nitric and nitrous acids, both oxidizing agents, but the nitric acid the more powerful. The nitric acid certainly and the nitrous acid probably unite with the coloring matter of the flour and bleach it. Nitrites are formed by the union of the nitrous acid with the bases in the flour and nitrates by the union of the nitric acid with those bases. The nitrates may be disregarded as non-injurious; the nitrites are claimed to be poisonous. The flour seized was subjected to the Griess-Ilsovoy test, an extremely delicate test for the detection of the presence of nitrites and was shown to contain nitrites or material reacting as nitrites to the amount of three parts per million. The misbranding is predicated on this. The sacks containing the flour were labeled "L 48, Lexington cream XXXXX, fancy patent. This flour is made of first quality hard wheat." In fact, the flour was milled from Turkey red wheat. This wheat replanted from year to year gradually degenerates and becomes mixed with a wheat of a yellow color, called locally "yellow berry." This admixture with yellow berry deteriorates the quality of the wheat. The wheat in question contained this yellow berry to the

extent of from fifteen to twenty-five per cent of its total quantity. Both Turkey red and yellow berry are hard wheats. This wheat graded as No. 2, and this was the best grade of wheat grown or milled in Nebraska or neighboring states. In other sections of the country wheat grading as No. 1 is grown. There can be milled from the same wheat flour of different grades. That flour which contains the entire flour content of the berry is called "straight flour"; patent flour excludes a part of the flour content; that part of the berry nearest the bran coat containing the greater part of the oil and coloring matter. Clear flour is the residue of the flour content of the wheat after taking out the patent flour. The result is that patent flour is whiter than straight and straight is whiter than clear flour.

The jury found separate verdicts, (1) that the flour seized was adulterated, and (2) that it was misbranded. The Court charged the jury: "It is clear that it was intended by Congress to prohibit the adding to the food of any quantity of the prohibited substance. The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water and in articles of food such as ham, bacon, fruits, certain vegetables and other articles does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore, the court charges you that the Government need not prove that this flour or food stuffs made by the use of it, would injure the health of any consumer. It is the character, not the quantity of the added substance, if any, which is to determine this case." This was excepted to and was assigned as error. There was evidence tending to prove that flour containing the percentage of nitrites found in the seized flour, might be injurious to health when used as a food for a considerable period, but this was disputed, and the converse supported by substantial testimony. This was the most stubbornly contested issue in the case, and that it was an issue was recognized by the Government at all stages of the trial.

The part of the statute material to a consideration of the correctness of this instruction is found in Sec. 7 of the Act, which reads:

"Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * * *

"In the case of food:

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

"Second. If any substance has been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed."

“Fifth. If it contain any added poisonous or other added deleterious ingredients which may render such article injurious to health
* * * *”

The instruction complained of referred to the charge in the libel under the fifth subdivision just quoted. The trial judge decided that if the added substance was qualitatively poisonous although in fact added in such minute quantity as to be non-injurious to health that it still fell under the ban of the statute; and the distinction is sought to be drawn between substances admittedly poisonous when administered in considerable quantities but which serve some beneficial purpose when administered in small amounts, and those substances which it is claimed never can benefit and which in large doses must injure. The distinction is refined. To apply it must presuppose that science has exhausted the entire field of investigation as to the effect upon the human body of these various substances; that nothing remains to be learned. Otherwise the court would be required to solemnly adjudge today that a certain substance is qualitatively poisonous because it can never serve a useful purpose in the human system only to have this conclusion made absurd by some new discovery. There is no warrant in the statute for such a strained construction. The object of the law was evidently (1) to insure to the purchaser that the article purchased was what it purported to be, and (2) to safeguard the public health by prohibiting the inclusion of any foreign ingredient deleterious to health. *Hall-Baker Grain Co. v. United States* (198 Fed. 614). The statute is to be read in the light of these objects, and the words “injurious to health” must be given their natural meaning. It will be observed that this paragraph of the statute does not end with the words “added deleterious ingredient” but as a precaution against the idea embodied in the instruction complained of, it says “which may render such article injurious to health.” Without these latter words, it might, with more force, be argued that deleterious and beneficent ingredients are to be divided into two general classes independent of their particular effect in the actual quantities administered, but the possibility of injury to health due to the added ingredient and in the quantity in which it is added, is plainly made an essential element of the prohibition. The investigation does not stop with the consideration of the poisonous nature of the added substance. It is added to the article of food and the statute only prohibits it if it may render such article—the article of food—injurious to health.

In *French Silver Dragee Co. v. United States* (179 Fed. 824), this question was considered by the Court of Appeals of the Second Circuit. In that case adulteration was charged in confectionery by the addition of silver. The article in question was made of sugar and

thinly coated with pure silver. The statute declares that confectionery shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug." The element of injury to health is not expressed as a qualification of mineral substance. Silver is admittedly a mineral substance and the act of the defendant was within the letter of the prohibition, but the court construing the statute in the light of the evils it was intended to remedy, the objects sought to be accomplished, held that there was implied in this clause relating to confectionery the very limitation expressed in the paragraph relating to food, and as there was no proof that the coating of silver might render the article injurious to health, it did not fall within the ban of the statute. It was there said: "Stated in another way we think that the history of the Act, the objects to be accomplished by it and the language of all its provisions, require that it should be so interpreted that in the case of confectionery as in the case of foods and drugs, the Government should establish with respect to products not specifically named that they either deceive or are calculated to deceive the public or are detrimental to health."

In *Friend v. Matt* (68 J. P. 589), there was under consideration Sec. 3 of 38-39 Victoria, Chap. 63, which reads: "No person shall mix, color, stain, or powder or alter, or permit another person to mix, color, stain or powder any article of food or any ingredient or material so as to render the article injurious to health." In that case the respondent was charged with selling preserved peas, the color of which had been retained by the addition of sulphate of copper. It was contended that as sulphate of copper in substantial quantity was injurious to health, the peas so treated with it were within the statute even if the treated peas were not injurious to health. This view prevailed in the trial court, but the judgment was reversed on appeal, Lord Alverstone, Chief Justice, saying: "I have no doubt that in order to convict under Sec. 3, the article of food must be shown to be injurious to health by the addition of some ingredient."

The instruction complained of eliminated a consideration of any possible injurious effect from the use of the flour as an article of food, and was erroneous. We are not unmindful of the contention that the evidence conclusively shows that flour subjected to the bleaching process is injurious to health in some degree, even if its injurious effect is so slight as to be incapable of observation, and that, hence, the instruction we have found to be error was error without prejudice. This contention is founded upon expert testimony as to the result from the taking of nitrites into the human

system. It is said that nitrites taken into the human body act upon the coloring matter of the red corpuscles of the blood so as to change the hemoglobin of the blood into methemoglobin. In the language of one of the chief chemical experts of the Government this effect is thus described:

In the blood stream there are red corpuscles, invisible to the naked eye, which contain a red coloring substance known as hemoglobin, when not combined with oxygen, and when combined with oxygen forming a dissociable compound, oxyhemoglobin. In respiration, the hemoglobin contained in the red corpuscles of the venous blood is brought into the lungs, where it having an affinity for the oxygen, which is one of the gaseous constituents of the air, combines with the oxygen to form oxyhemoglobin. This oxyhemoglobin contained in the red blood corpuscles is then conveyed, through the arterial system to the various parts of the body, and of the terminals of the arterial system, passing through a mass of tissue, it gives up its oxygen, to oxidize the tissues, or materials that may be in solution there, to form carbon dioxide, and to form water, and this oxyhemoglobin is thereby reduced to the condition of hemoglobin which is returned by the venous system to the lungs, to be again oxygenated. That is where the hemoglobin will again combine with oxygen to form oxyhemoglobin, and a given quantity of hemoglobin may serve to carry a given quantity of oxygen to the system. Now, however, if any of this hemoglobin is converted into methemoglobin, which is a compound of oxygen with hemoglobin, in which the oxygen is more firmly combined than in the case of oxyhemoglobin, although the quantity of oxygen is the same, the oxygen is so firmly attached—combined with the hemoglobin—that the vital processes are not sufficiently strong to separate the oxygen from the hemoglobin, nor to use the oxygen to oxidize the tissue and tissue material, to sustain life, and, consequently, it passes through the circulation to the arterial system and the venous system, and continues this cycle until, finally, it is destroyed by the liver. Therefore, a certain quantity of the hemoglobin is rendered inefficient. It no longer functionates as a carrier of oxygen to the system, serves, or acts, as a foreign body in the blood circulation, and, therefore, must be removed. As I have said before, an extra strain is placed upon the liver, in order to remove it, and an extra strain is placed upon the red blood marrow, in adults, to regenerate the corpuscles, and to replace the corpuscles of the hemoglobin that have been rendered inactive by the action of nitrite, and the formation of methemoglobin.

It is also said that the continued presence of nitrites in the system does not develop any tolerance on the part of the body or means of neutralizing its normal action. On the other hand, it was proved that no injurious effect had ever been observed from the use of bleached flour although such flour had been largely used. That nitrites in some or greater amounts are frequently present in potable water, bacon, ham, fruits and certain vegetables, and even in the saliva of both adults and children, and no evil result has been detected. That urea

usually present in saliva is, when taken into the stomach, a neutralizer of nitrites, and is a method by which nature averts harm from minute quantities of nitrites so constantly taken into the system. In this conflict of evidence it was essentially a matter for the jury to find the fact under proper instructions. Expert testimony is but evidence. In case of dispute the controversy cannot be settled by the judicial knowledge of the court. (U. S. v. McClue, 1 Curtis, C. C. 1-9; U. S. v. Molloy, 31 Fed. 19.) It cannot be held that the evidence was so conclusive in favor of the Government as to warrant the court in withdrawing this issue from the jury.

The Government also claimed that the seized flour was adulterated within the first and fourth subdivisions of Section 7 before quoted in that a substance, viz.: Nitrites or nitrite reacting material had been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength and that it had been thereby colored in a manner whereby damage or inferiority is concealed. The claimant requested a peremptory instruction in its favor on the issues so tendered by the libel, and assigns the refusal to so instruct as error.

The mixture referred to in the first subdivision must be held to include a chemical compound as well as a mechanical mixture. While this does not accord with the scientific definition of a mixture, yet in common acceptation mixtures and compounds are not discriminated. The evil intended to be remedied by the statute is not limited to a mechanical mixture, but is just as potent when the chemical union results from the two substances with the deleterious effect intended to be prevented by the Act. Similarly, the word "colored" must be held to include any artificially produced change in the natural color of the substance "in a manner whereby damage or inferiority is concealed," even if the change is, as in this case, a removing of color. This is the evident intent of the statute. The Act is essentially remedial, and its evident purpose is not to be defeated by any narrowness of construction. *Johnson v. Southern Pacific Co.* (196 U. S. 1). There was evidence that bleached flour did not improve with age in the manner characteristic of unbleached flour, nor did it, as the claimant contended, suddenly take on the condition of properly aged flour which had not been subjected to the bleaching process. That in dough made from bleached flour the gluten never attained the toughness found in dough from unbleached and properly aged flour, and that this toughness was a valuable property in the making of bread. In other words, that as an ultimate result of the mixing of the flour with nitrogen peroxide gas the bread making quality had been injuriously affected. We are not concerned with the opposing testimony. It was for the jury to determine the fact and the

court did not err in refusing to peremptorily instruct for the claimant so far as the claim of adulteration was based on the first subdivision before quoted.

The claim of adulteration under the fourth subdivision presents a different question. There is evidence that flour made from new wheat is darker in color than the flour made from wheat which has gone through an incipient fermentation or sweating process in the stack, and second, through a similar process after threshing. This involves time. Also, that freshly milled flour is darker than it subsequently becomes when kept for a certain period of time. That clear flour is darker than straight flour and straight flour is darker than patent flour. That color is to some extent an index of the quality of the flour, and as such influences the ordinary purchaser. That all grades of bleached flour are whiter than unbleached. In this way the index of color becomes unreliable and a purchaser may take the bleached straight for unbleached patent flour. With the evidence on which the inferiority of the bleached flour is claimed, this it is contended, brings the case within the fourth subdivision of Sec. 7. Opposed to this, it appears that color is at best an uncertain index of quality, and that dealers in flour use other means to ascertain quality. That the color of bleached flour is distinct from that of unbleached flour; the dead white of the bleached is contrasted with the cream white of the unbleached. That bleaching of flour does not obliterate the differences in appearance of different grades of bleached flour. That while patent flour obtains a higher price in the market than straight flour this is not due to any superiority in patent flour from a nutritious standpoint but is due to the fact that bread baked from it is whiter in appearance and, hence, more pleasing to the eye. This esthetic result can be obtained by a certain process of conditioning the wheat and milling the flour. Was it the intention of the statute that this process should have a monopoly? Whiteness in flour is a desirable end in and of itself. Its connection with flour of any particular grade is purely incidental. We are not persuaded that by the bleaching process flour is so colored as to conceal inferiority, or that by it, flour is adulterated within the intent of subdivision four of Sec. 7 of this Act.

The court submitted to the jury the charge contained in the libel that this flour was misbranded, and in effect, instructed the jury that they should find for the Government if the flour was not a patent flour or was not made from first quality hard wheat. This was excepted to and is assigned as error. The contention of the plaintiff in error, as presented to the trial court by various requests for instructions, is that no evidence was introduced tending to prove that the seized flour was not a patent flour, and that the issue tendered by the

libel as to the quality of the wheat only went to the question whether it was hard or soft wheat, and that there was no evidence that the wheat was soft. It will serve no useful purpose to review at length the evidence. It suffices to say that it appears that the seized flour contains ninety per cent of the flour content of the wheat; that there is no fixed standard as to the percentage of the flour content which may be properly termed patent flour. When the process first originated a relatively low percentage was called patent flour; as improvements were made in the methods of manufacture a higher percentage was customarily so labeled. Different mills adopt different standards, varying in accordance with the efficiency of their methods of manufacture. The quality of the wheat milled also enters into the question. The better the wheat the higher the percentage of the flour content that may properly be classed as patent flour. The case of the Government rests entirely on the evidence of some millers that in their opinion no greater percentage than eighty-five per cent can be properly classed as patent flour. This evidence is based upon the experience of those witnesses with different machinery and wheat, and is not predicated upon the claimant's methods of manufacture. There is a concurrence of the witnesses that the term "patent flour" does not connote any fixed or maximum percentage of the flour content of the berry. In other words, by patent flour is meant flour containing less than the total of the flour content of the wheat. Giving those words that signification there was no evidence of falsity, and the claimant was entitled to have that issue withdrawn from the jury by a peremptory instruction in its favor.

It was charged in the amended libel that the seized flour was misbranded in that it was labeled as made of the first quality of hard wheat, whereas, in truth it was made in whole or in part of soft wheat. This charge was denied in the answer. The evidence adduced in its support is that the flour was milled from No. 2 Turkey red wheat and was not of the first quality, but that no soft wheat entered into its composition. The trial court, in substance, instructed the jury that if the wheat was not of the first quality the charge of misbranding was sustained. Fairly construed the libel tendered the issue of soft wheat as distinguished from hard wheat. The pleader assumed that it was incumbent upon him to specify the particular in which the branding was false. If it be permissible to so specify and failing to support the specification, to prove falsity in another particular within the general averment of falsity, then the specification serves but to draw the attention of the defendant from the actual point of controversy and to mislead. It was error to submit the charge of misbranding to the jury.

Errors are assigned on various rulings in the admission of testimony, but as the pages of the record which presented the testimony objected to are not stated in the brief of the plaintiff in error, as required by rule 24 of this Court, we deem it unnecessary to consider them. (Hoge v. Magnes, 85 Fed. 3558.)

The constitutionality of the Food and Drugs Act is attacked by the plaintiff in error and was exhaustively argued. The point of the attack is that the statute as construed by the trial court applied to food products in fact entirely innocuous and which could not possibly be injurious to health nor deceptive. As we have not so interpreted the statute, it is not necessary to express any opinion as to the validity of a statute excluding from interstate commerce harmless food products which are offered for sale without deception.

The judgment below must be reversed and the case remanded for a new trial, and it is so ordered.

Filed January 23, 1913.

A true copy.

Attest:

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals,
Eighth Circuit.

[Cir. 71]





Issued April 18, 1913.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 72.

W. P. JONES, Acting Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Circuit Court of Appeals for the Sixth Circuit, affirming the decision of the District Court for the Southern District of Ohio. Proceedings under section 2 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768).

SYLLABUS.¹

The word "package" as used in the Food and Drugs Act, June 30, 1906, means the package which passes into the possession of the consumer.

The words "original unbroken package" relate to the form in which it is received by the vendor or assignee.

A misbranded medicine or prescription sent through the channels of interstate commerce is within the terms of the act.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

THE DR. J. L. STEPHENS COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

Error to the District Court of the United States for the Southern District of Ohio, Western Division.

Before WARRINGTON and DENISON, Circuit Judges, and COCHRAN, District Judge.

PER CURIAM. This is a proceeding on writ of error to set aside a judgment rendered and sentence pronounced upon an information. The information contained two counts, and was based on the Pure Food and Drugs Act of June 30, 1906. The plaintiff in error, hereafter called defendant, is an Ohio corporation doing business and having its principal office at Lebanon, Ohio. It there maintains a sanatorium, where persons addicted to the drug and liquor habits are

¹ Not by the court.

treated; and patients are also treated away from the institution through correspondence. According to an agreed statement of facts, the defendant shipped two boxes of medicine by railway from Lebanon, Ohio, to Washington, D. C.; one shipment was made December 19, 1908, and the other October 22, 1909; each box contained 18 bottles of the medicine, and all the bottles contained alcohol as one of the ingredients, and some contained as another ingredient morphine in varying and diminishing quantities. The bottles were labeled "Maplewood Sanatorium. Ledger M. 45. 3,609. Directions: Take half a tablespoon four times a day and as directed." The president of defendant, who was also its medical director, has charge of the patients at the sanatorium, and also of those who are treated at a distance through correspondence. He is a graduate of Columbia University, New York City, and has had a long and varied experience; indeed, he is a specialist in the treatment of patients addicted to drug and liquor habits. In the agreed statement of facts this appears:

It is a recognized fact by the medical profession generally that in the treatment of diseases, especially the drug habit, it is an important, and in most cases a vital factor, that the patient should not know the composition of the medicines given in such treatment.

This agreed fact is offered as a defense to the charge that the medicine in question was mislabeled and misbranded, because correct labeling and branding would defeat the object of the treatment. The defendant has no proprietary medicines and does not offer or sell any medicines to the general public. In every case where a patient applies for treatment, either at the sanatorium or at the patient's home, a history of the case is obtained from the patient, a diagnosis in each instance is made, and a prescription prepared by the medical director to meet the needs of the particular case.

The cause was submitted upon the agreed statement of facts alluded to, and each party asked for a directed verdict. The case was fully considered by the trial judge, who directed a verdict in favor of the Government and sentenced the defendant to a fine of \$50 and costs of prosecution. Among the questions determined was, whether it was necessary to allege that the two boxes or packages containing the bottles of medicine were misbranded, the information having simply charged that each of the bottles contained in such packages was misbranded. The court held that the word "package," as used in the act, "means the package which passes into the possession of the public, of the real consumer; and that the words, 'original unbroken package,' relate * * * to the package in the form in which it is received by the vendee or consignee."

Another question determined was:

* * * whether the Pure Food and Drugs Act deals with articles other than those which are the subject of bargain and sale. It is urged that the medicine or prescription is a mere incident of the services rendered, and that it is not therefore to be treated as an article of commerce.

Upon this question the court held:

As was said in the *Hipolite Egg Company* case (220 U. S., 45), the object of the law is to keep adulterated and misbranded articles out of the channels of interstate commerce, and it is immaterial whether the medicine or prescription which was furnished by the defendant company was the mere incident of the employment, or its primary object. It is enough to know that the medicine or prescription was sent through the channels of interstate commerce, and misbranded, within the terms of the act.

Still another question was determined:

Is a reputable, regularly licensed, practicing physician, residing in Ohio, who prescribes for a person beyond the limits of the State and transmits to such person through the channels of interstate commerce the medicine prescribed, subject to the penalties of the law, if the medicine so prescribed and so passing through the channels of interstate commerce, contains morphine—the bottle, box, container, or package inclosing the medicine so prescribed and to be taken by the patient not being so labeled as to show the presence of the drug?

We do not find it necessary to pass upon the last question stated. The medical director did not in his individual capacity prescribe or furnish the medicine for the persons served in this case. His acts were performed for the corporation, and in legal contemplation by it (*State v. Laylin*, 73 O. S., 90, 100). We agree with Judge Sater in his conclusions upon the other two questions, and so must affirm the judgment.



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 73.

W. P. JONES, Acting Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Second Circuit, Affirming the Decision of the Circuit Court of the United States for the Western District of New York, in cases arising under the Twenty-eight Hour Law (Act of June 29, 1906; 34 Stat., 607).¹

SYLLABUS.²

1. Under the Twenty-eight Hour Law a connecting carrier is bound to make reasonable inquiry as to the length of time live stock have been previously confined in cars without feed, rest, and water.
 2. *Prima facie* 3 hours and 35 minutes is too long a time to consume in transporting a shipment of live stock 7 miles, and the defendant, to avoid the charge of willful violation, should have offered proof to excuse its lack of diligence.
-

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THE NEW YORK CENTRAL & HUDSON RIVER Railroad Company, plaintiff in error (de- fendant below), <i>against</i> UNITED STATE OF AMERICA, DEFENDANT IN error (plaintiff below).	}
--	---

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge:

Two cars loaded with horses were shipped from Girard, Kansas, consigned to shippers' order at the defendant's stockyard in East Buffalo. The routing was via the St. Louis & San Francisco Railroad Co. to Kansas City, thence by the Wabash Railroad Co. through Missouri, Indiana, Iowa, Michigan, and Canada to Black Rock, Buffalo, where the cars were received by the defendant to be transported to destination, a distance of 7 miles. The Wabash Company did not unload the horses for food, water, and rest between Peru,

¹ For decision of lower court see Circular No. 62, Office of the Solicitor.

² Not by the court.

Indiana, and Black Rock, a period of 38 hours and 55 minutes. The defendant occupied 3 hours and 35 minutes in transporting the cars to destination in East Buffalo.

The United States instituted these two actions to recover of the defendant a penalty of \$500 for each car for violation of the act of June 29, 1906 (34 Stat. L., 607), sections 1 and 3 of which read:

SEC. 1. That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than 28 consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided*, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SEC. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided*, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

The complaint alleged the foregoing facts and also that the defendant was not prevented from complying with the act by storm or other accidental and unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, but

knowingly and willfully failed to unload the horses in transit as aforesaid.

The defendant filed answers which alleged that it received the cars at Black Rock from its connecting carrier, the Wabash Railroad Co., without knowing the time the horses had been confined, and transported them within the usual and reasonable time to destination in East Buffalo; also that if there were any violation of law it was committed by the Wabash Railroad Co., which had been sued by the United States and fined, which judgment duly satisfied it pleaded in bar of the action.

At the trial a jury was duly waived and the cause submitted to the court. The parties stipulated that the facts stated in the complaint were true; also that the time of confinement of the horses had been extended from 28 to 36 hours, the defendant reserving the right to show that when it received the cars it did not know that the horses had been confined longer than the law allowed; also to prove that if it had refused to transport the cars they would have had to go back to Michigan, a trip taking from 15 to 20 hours, before the horses could have been unloaded because, being carried in bond, they could not be unloaded in Canada; also to prove that the usual time for transporting live stock from Black Rock to the stockyards was from 1½ hours to 5 hours, depending upon circumstances.

The first question is, Did the defendant act knowingly in the transportation of the cars? That is, did it know when the horses had been last unloaded. Relying, no doubt, upon the proposition that the burden of proof lay upon the Government, the defendant gave no evidence at all upon the subject. But we think it was bound to make reasonable inquiry as to this fact. The humane purpose of the law would be frequently frustrated if the Government were compelled to prove facts directly and often exclusively within the knowledge of the carrier. When the Government had proved that the time had long elapsed within which the horses should have been unloaded knowledge of that fact was properly imputed by Judge Hazel to the defendant in the absence of any evidence from it that it had made reasonable inquiry and could not ascertain the fact.

The next question is, Did the defendant act willfully in the premises; that is, unnecessarily disregard the provisions and purpose of the law? Obviously it did the best thing for the horses in taking them to the stockyard in East Buffalo. The time it could properly use in so doing would depend upon whether the period of confinement had or had not expired. Knowledge of the fact that it had expired being imputed to the defendant, it was bound to transport them as quickly as possible. *Prima facie* three hours and 35 minutes was an unreasonable time to move the cars seven miles. The only testimony the

defendant offered upon the subject was the opinion of two freight conductors that, in view of the condition of the belt line in getting ready for grade-crossing improvements, the time actually occupied was reasonable. This was entirely insufficient. The facts should have been stated so that the court might determine whether the time was reasonable or not.

The judgment recovered against the Wabash Railroad Company is not a bar. The fact that it has been punished for its own delinquency furnishes no defense to the defendant if it was subsequently delinquent, as the court has rightly found. *Lehigh Valley R. R. Co. v. United States* (184 F. R., 971), affirmed by this court (187 F. R., 1006).

The judgment is affirmed.

(March 10, 1913.)

[Cir. 73]

○

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 74.

FRANCIS G. CAFFEY, Solicitor.

THE MEAT INSPECTION LAW.

Opinion of the District Court of the United States for the Eastern District of Missouri in a case arising under the Meat Inspection Law (Act of June 30, 1906; 34 Stat., 674).

SYLLABUS.¹

For the purpose of preventing the use in interstate or foreign commerce of any meat or meat food products under any false or deceptive name, the Secretary of Agriculture has the power and authority under the Meat Inspection Act of June 30, 1906, to make and promulgate a regulation requiring that sausage shall not contain cereal in excess of 2 per cent, nor water or ice in excess of 3 per cent.

IN THE UNITED STATES DISTRICT COURT, EASTERN DIVISION, EASTERN
JUDICIAL DISTRICT OF MISSOURI.

ST. LOUIS INDEPENDENT PACKING COM- pany, plaintiff, vs. HONORABLE DAVID F. HOUSTON, ET AL., defendants.	}	No. 4156. In Equity.
---	---	----------------------

DYER, J.:

The defendants in this case are the Secretary of Agriculture, the Chief of the Bureau of Animal Industry and the Chief Inspector of said Bureau. The latter is the only one of the defendants before the court. The other two are non-residents and therefore without the jurisdiction of the court.

The bill discloses the fact that the complainant is a corporation organized under the laws of Missouri, and as such owns and operates a slaughtering establishment, at which it conducts the business of slaughtering cattle, sheep and hogs and manufacturing a meat product commonly styled and designated as *sausage*.

The plaintiff alleges that the sausages so manufactured by it "are compounds and mixtures composed and manufactured from meat of hams, pork, spices and cereals." That in the product thus manufactured there is contained from one to ten per cent of wholesome

¹ Not by the court.

cereal and a varying amount of pure water, which together with meat and spices make a sound, healthful and wholesome product, with which there is neither dyes, chemicals, preservatives or ingredients calculated to make the same unfit for human food.

The bill further alleges that the use of cereal and water in the manufacture of sausage is customary and necessary and has been universally recognized for more than fifty years, and ever since sausages have been known as a commercial product.

It further appears by the allegations of the bill that after the approval by the President on the 30th of June, 1906, of an act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30th, 1907", the Secretary of Agriculture, claiming to act under the provisions of said Act of Congress, established at the plant of the plaintiff, in the City of St. Louis, a system of inspection by which the operation of said plant was under the charge of an inspector assigned by the Bureau of Animal Industry, to supervise its official work, etc., etc.

It is not deemed necessary to recite the various provisions and allegations of the bill to get at the real point of controversy involved here.

It may be briefly summarized as follows:

The plaintiff is a manufacturer of a commodity called sausage, and in the manufacture thereof it uses as a part of the product from one to ten per cent of wholesome cereal and a varying amount of pure water; that the Secretary of Agriculture, on the 28th of February, 1913, promulgated the following regulation to be effective on April 1st, thereafter, to-wit:

UNITED STATES DEPARTMENT OF AGRICULTURE,

OFFICE OF THE SECRETARY,

Washington, D. C., Feb. 28, 1913.

For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the Act of Congress, approved June 30, 1906 (34 Stat., 674), Regulation 18 is hereby amended by the addition of sections 15 and 16, to read as hereinafter set out.

This amendment, which for purposes of identification is designated as Amendment 4 to B. A. I. Order 150, shall become effective on and after April 1, 1913.

JAMES WILSON,

Secretary of Agriculture.

SECTION 16. PARAGRAPH 1. Sausage shall not contain cereal in excess of two per cent. When cereal is added its presence shall be stated on the label or on the product.

PARAGRAPH 2. Water or ice shall not be added to sausage except for the purpose of facilitating grinding, chopping and mixing, in which case the added water or ice shall not exceed three per cent. except as provided in the following paragraph:

[Cir. 74]

PARAGRAPH 3. Sausages of the class which are smoked or cooked, such as Frankfort style, Vienna style, and Bologna style, may contain added water in excess of three per cent but not in excess of an amount sufficient to make the product palatable. When water (in excess of three per cent) and cereal are added to this class of sausages the statement "Sausage, water, and cereal" shall appear on the label or on the product, but when no cereal is added the addition of water need not be stated.

The bill claims that this regulation is null and void on the ground that the Secretary was without authority to make the same and that the Act of Congress conferred upon him no such power. It will be seen, therefore, that the real point in controversy is as to whether the regulation is valid or invalid.

If it is valid, the prayer of the bill for an injunction should be denied, otherwise granted.

So much of the Act of Congress as is deemed applicable to the present inquiry, is as follows:

That when any meat or meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked "Inspected and passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been "inspected and passed" under the provisions of this Act; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted.

* * * * *

That any person, firm, or corporation, or any officer or agent of any such person, firm, or corporation, who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor and shall be punished on conviction thereof by a fine of not exceeding ten thousand dollars or imprisonment for a period of not more than two years, or by both such fine and imprisonment, in the discretion of the court.

* * * * *

Said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act, and all inspections and examinations made under this Act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this Act.

It would seem from the act that no meat nor meat food products can be "sold or offered for sale by any person, firm or corporation

in interstate or foreign commerce *under any false or deceptive name*; but established trade name or names which are usual to such products and which *are not false and deceptive*, and which shall be *approved by the Secretary of Agriculture* are permitted."

If the meat product of the plaintiff called *sausage*, (composed of meat, and spices and cereal in excess of two per cent and water in excess of three per cent) is a false or deceptive name, then and in that case the plaintiff would not be authorized to sell or offer for sale such product, called sausage; nor would the inspector be authorized to put thereon the words "inspected and passed."

The Act of Congress declares that no "meat or meat food product shall be sold or offered for sale by any person, firm or corporation in interstate or foreign commerce under any false or deceptive name."

The Act further provides that the Secretary of Agriculture shall from time to time make such rules and regulations as are necessary for the efficient execution of the provisions of this Act.

The regulation complained of in the bill recites that "For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name * * * sausage shall not contain cereal in excess of two per cent * * * nor water or ice in excess of three per cent."

Had the Secretary power and authority to make and promulgate the regulation complained of? The court answers the question in the affirmative.

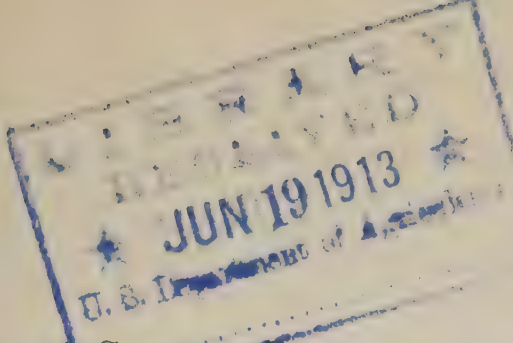
This court is no better informed than the Judge of the Supreme Court of Michigan who wrote the opinion in *Armour & Co. vs. Bird* (159 Mich.). He said:

Sausage is defined by all the lexicographers as an article of food composed of meat, salt and spices. The people generally so understand it. The writer of this opinion would be compelled to admit that until very recently he had no knowledge that cereal was used in the manufacture of sausage.

This Judge although eating sausage for seventy years never knew or even heard that cereals were used in this toothsome delicacy until the beginning of this hearing on last Tuesday.

The Act of Congress under which the Secretary of Agriculture claims to have acted in promulgating the order of February 28, 1913, is so important in its character, and so far reaching in its effect upon the good of mankind, the court should be absolutely sure of its footing before it strips the officer (charged with the duty of making "such rules and regulations as are necessary for the efficient execution of the provisions of the act") of the right he claims to have exercised, in promulgating the order of February 28, 1913.

The prayer of the plaintiff for a temporary injunction will be denied, and it is so ordered.



Issued June 3, 1913.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 75.

FRANCIS G. CAFFEY, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Third Circuit, affirming the decision of the District Court of the United States for the District of New Jersey, in a case arising under the Twenty-Eight Hour Law (Act of June 29, 1906; 34 Stat., 607).

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MARCH TERM, 1913—No. 1712.

UNITED STATES (PLAINTIFF BELOW), Plaintiff in error, <i>vs.</i> LEHIGH VALLEY RAILROAD COMPANY, defendant in error.	}	Error to the United States District Court for the Dis- trict of New Jersey.
---	---	---

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

McPHERSON, Circuit Judge:

This action against the Lehigh Valley Railroad Company was brought to recover a penalty for knowingly and wilfully failing to comply with the Twenty-eight Hour Law of June 29, 1906. We take the following summary of certain undisputed facts from the Government's brief:

On February 17, 1911, 226 lambs were shipped by C. F. and W. F. Pratt over the defendant's railroad, from Batavia, N. Y., consigned to Newton & Company, Jersey City, contained in a car initialed and numbered "L. V. 89625" and conveyed over said line of railroad in that car to Jersey City, and thence by a boat known as "L. V. Barge 503," owned and used by the company for purposes of transportation, to the Jersey City stockyards at Jersey City.

It appears that the stock was fed at Coxton, Pa., at which place it was re-loaded at 6.15 p. m., February 18, 1911, remaining in the car until 3.15 p. m., February 19, 1911, when the lambs were unloaded into the stock pens of the

defendant company at Jersey City, remaining in the pens until 3.15 a. m., February 20, 1911, when they were loaded into the said barge and remained therein until 8 a. m., February 20, 1911, at which said last mentioned time they were finally unloaded at the stockyards of the Jersey City Stock Yards Company at Jersey City, the place of destination.

* * * * * *

The time between the loading at Coxton, Pa., 6.15 p. m., February 18, and the hour when unloaded into the pens of the railroad company at Jersey City, 3.15 p. m., February 19, was 21 hours. The stock remained in the pens from 3.15 p. m., February 19, 1911, to 3.15 a. m., February 20, 1911, a period of 12 hours, and they were then loaded into the barge and unloaded therefrom at 8 a. m. on the same day, to wit, February 20, 1911, a period of 4 hours and 45 minutes, making the total period of time from the reloading at Coxton, Pa., to the final unloading at Jersey City, the place of destination, 37 hours and 45 minutes, as shown below :

	Hours.
Coxton to Jersey City-----	21
In stock pens-----	12
On barge-----	4½

Totaling 37 hours and 45 minutes, within which period of time the stock was not fed.

The company asked for binding instructions on three grounds:

(1) That the act applies only to the confinement of animals in cars, boats, and vessels, and not to their confinement in stockyard pens.

(2) That no evidence had been offered of a knowing and willful failure to comply with the statute.

(3) That the overwhelming evidence had established the fact of feeding within the statutory period.

The trial judge submitted the second and third questions to the jury, but reserved the first for consideration later. After a verdict in favor of the Government he entered judgment for the defendant on the point reserved, giving the reasons quoted in the margin.¹ (The case has not yet been reported.)

¹ The penalty of section 3 can, as expressly provided, be applied only when the carrier has failed to comply with the provisions of both sections 1 and 2; that is, the carrier must have confined the animals in cars, boats, or vessels for a period longer than 28 consecutive hours without unloading the same into pens for rest, water, and feeding, and it must also have failed to properly feed and water the animals so unloaded during such period of rest. The animals in question were not, however, confined in the cars, boats, or vessels, of any description of the defendant for a longer period than 21 consecutive hours, or for a longer period in all than 25 hours and 45 minutes, during their transportation from Coxton, Pa., to their destination. Consequently there was no infraction of the statute.

The statute under which this action is brought is penal and must be strictly construed. At all events it can not be so construed as to create offenses and inflict penalties not in terms expressed, or necessarily implied from what has been expressed. It seems too plain for argument that no offense is created by this statute, which does not contain as one of its elements the confinement of the animals being transported in the cars, boats, or vessels of the carrier for a period longer than 28 consecutive hours without unloading, etc. In order to make out a violation of the statute in this case at least 7 hours of the period during which the animals were unloaded and resting in stock pens must be tacked to the 21-hour period of confinement in the cars of the defendant. Moreover, if we take the total period of confinement in the cars, boats, and vessels of the company,

Of course the question before us on this writ is the correctness of the judgment, and if it may properly be supported upon any ground we should affirm it. The company asks for affirmance upon two grounds—(1) for the reasons given by the district judge, and (2) because no evidence was offered that the company had knowingly and willfully failed to comply with the statute. It is not necessary to consider the first ground, as the second seems to us amply sufficient to support the judgment. We have carefully considered the relevant evidence, which was given by several witnesses whose testimony is not referred to in the foregoing summary quoted from the Government's brief. None of them had any recollection about the particular car in question; their evidence was mainly devoted to proving the orders in force upon the subject of feeding animals in transit, the means provided by the company for carrying such orders into effect, and the course of conduct customarily followed at the yards in question. This evidence bore also upon the possibility or probability that such of the company's servants as were charged with the particular duty involved in the suit had failed for some reason to give the animals food. It appeared that thousands of animals of one kind and another reached the company's yards at Jersey City in the course of a year, but there is no suggestion of any other failure to comply with the law. It would serve no good purpose to detail what the witnesses said upon the foregoing subjects. It is enough to say, we think, that a careful examination of the stenographer's notes has satisfied us that the evidence can go no farther than to establish negligence in the care of this particular shipment on the part of one or more of the company's servants. The verdict requires us to assume that the lambs were not fed within the statutory period, but we repeat that in our opinion the fact is accounted for by negligence and can not be attributed to a "knowing and willful" disregard of duty.

These words mean something more than "negligent." A knowing and willful omission to perform a duty is not, as we think, the same as a merely careless omission. For example, let us suppose that the man whose duty it was to feed these lambs had learned the length of their confinement from the car accompanying the shipment, but that his attention had been diverted so that he forgot his task until the

it only amounts to 25 hours and 45 minutes, made up of 21 hours' confinement in its cars and 4 hours and 45 minutes on its barge, which hours of confinement, furthermore, were not consecutive, as provided by the act.

The act neither in terms nor by necessary intendment embraces the case in question. Indeed, its language prohibits the construction which the Government seeks to put upon it. If Congress had intended to cover a situation like that here presented, it could easily have done so by prohibiting the confinement in any manner of animals being transported in interstate commerce for a period longer than 28 hours without feeding, watering, and resting them, etc. Confessedly, my inclination has been to so construe the act, if possible, as to make it cover the case in question; but it can not be done, in my judgment, without an exercise of the legislative, rather than the judicial, function.

period limited by the statute had passed. No doubt this would be negligence, but to call it a "willful" failure of duty seems to contradict one of the essential facts supposed. It is not possible to omit an act knowingly and willfully, unless the act be consciously in the mind; if it be no longer in the mind, it can not be within the range of either knowledge or intention.

In the absence of better evidence on the subject than was offered by the Government, the presumption that the company did its duty and obeyed the statute must prevail. There is really nothing to rebut it except another and a weaker presumption, namely, the presumption that the lambs were not fed because no report of their feeding appears in the company's records. We say that this presumption is weaker, because it is evident that the absence of the report is susceptible of at least three explanations: (1) That some one knowingly and willfully failed to feed the animals; or (2) that such failure was merely negligent; or (3) that they really had been fed although the fact had not been reported. With the evidence in this condition there was nothing to be submitted to a jury.

The courts have not fully agreed in their efforts to define the words under consideration, but we are disposed to adhere to the opinion, that "knowingly and willfully" is not synonymous with "negligently." Without quoting from the following cases, we refer with approval to *United States v. Union Pacific R. R. Co.* (C. C. A.), 169 Fed., 65; *St. Louis, &c., Co. v. United States* (C. C. A.), 169 Fed., 69; *United States v. Stock Yards Terminal Co.* (C. C. A.), 178 Fed., 19; *St. Joseph Stock Yards Co. v. United States* (C. C. A.), 187 Fed., 104; *Chicago, &c., Co. v. United States* (C. C. A.), 194 Fed., 342; *United States v. Sioux City Co.* (C. C.), 162 Fed., 556; *United States v. Atchinson, &c., Co.* (D. C.), 166 Fed., 160. For a somewhat different view, see *New York, &c., Co. v. United States* (C. C. A.), 165 Fed., 833, and *United States v. Atlantic, &c., Co.* (C. C. A.), 173 Fed., 764.

The judgment is affirmed.

(Received and filed May 5, 1913.)



Issued June 3, 1913.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 75.

FRANCIS G. CAFFEY, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Decision of the Circuit Court of Appeals for the Third Circuit, affirming the decision of the District Court of the United States for the District of New Jersey, in a case arising under the Twenty-Eight Hour Law (Act of June 29, 1906; 34 Stat., 607).

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MARCH TERM, 1913—No. 1712.

UNITED STATES (PLAINTIFF BELOW),
Plaintiff in error,

vs.

LEHIGH VALLEY RAILROAD COMPANY,
defendant in error.

Error to the United States
District Court for the Dis-
trict of New Jersey.

Before GRAY, BUFFINGTON, and MCPHERSON, Circuit Judges.

MCPHERSON, Circuit Judge:

This action against the Lehigh Valley Railroad Company was brought to recover a penalty for knowingly and wilfully failing to comply with the Twenty-eight Hour Law of June 29, 1906. We take the following summary of certain undisputed facts from the Government's brief:

On February 17, 1911, 226 lambs were shipped by C. F. and W. F. Pratt over the defendant's railroad, from Batavia, N. Y., consigned to Newton & Company, Jersey City, contained in a car initialed and numbered "L. V. 89625" and conveyed over said line of railroad in that car to Jersey City, and thence by a boat known as "L. V. Barge 503," owned and used by the company for purposes of transportation, to the Jersey City stockyards at Jersey City.

It appears that the stock was fed at Coxton, Pa., at which place it was reloaded at 6.15 p. m., February 18, 1911, remaining in the car until 3.15 p. m., February 19, 1911, when the lambs were unloaded into the stock pens of the

defendant company at Jersey City, remaining in the pens until 3.15 a. m., February 20, 1911, when they were loaded into the said barge and remained therein until 8 a. m., February 20, 1911, at which said last mentioned time they were finally unloaded at the stockyards of the Jersey City Stock Yards Company at Jersey City, the place of destination.

* * * * * *

The time between the loading at Coxton, Pa., 6.15 p. m., February 18, and the hour when unloaded into the pens of the railroad company at Jersey City, 3.15 p. m., February 19, was 21 hours. The stock remained in the pens from 3.15 p. m., February 19, 1911, to 3.15 a. m., February 20, 1911, a period of 12 hours, and they were then loaded into the barge and unloaded therefrom at 8 a. m. on the same day, to wit, February 20, 1911, a period of 4 hours and 45 minutes, making the total period of time from the reloading at Coxton, Pa., to the final unloading at Jersey City, the place of destination, 37 hours and 45 minutes, as shown below:

	Hours.
Coxton to Jersey City-----	21
In stock pens-----	12
On barge-----	4½

Totaling 37 hours and 45 minutes, within which period of time the stock was not fed.

The company asked for binding instructions on three grounds:

(1) That the act applies only to the confinement of animals in cars, boats, and vessels, and not to their confinement in stockyard pens.

(2) That no evidence had been offered of a knowing and willful failure to comply with the statute.

(3) That the overwhelming evidence had established the fact of feeding within the statutory period.

The trial judge submitted the second and third questions to the jury, but reserved the first for consideration later. After a verdict in favor of the Government he entered judgment for the defendant on the point reserved, giving the reasons quoted in the margin.¹ (The case has not yet been reported.)

¹ The penalty of section 3 can, as expressly provided, be applied only when the carrier has failed to comply with the provisions of both sections 1 and 2; that is, the carrier must have confined the animals in cars, boats, or vessels for a period longer than 28 consecutive hours without unloading the same into pens for rest, water, and feeding, and it must also have failed to properly feed and water the animals so unloaded during such period of rest. The animals in question were not, however, confined in the cars, boats, or vessels, of any description of the defendant for a longer period than 21 consecutive hours, or for a longer period in all than 25 hours and 45 minutes, during their transportation from Coxton, Pa., to their destination. Consequently there was no infraction of the statute.

The statute under which this action is brought is penal and must be strictly construed. At all events it can not be so construed as to create offenses and inflict penalties not in terms expressed, or necessarily implied from what has been expressed. It seems too plain for argument that no offense is created by this statute, which does not contain as one of its elements the confinement of the animals being transported in the cars, boats, or vessels of the carrier for a period longer than 28 consecutive hours without unloading, etc. In order to make out a violation of the statute in this case at least 7 hours of the period during which the animals were unloaded and resting in stock pens must be tacked to the 21-hour period of confinement in the cars of the defendant. Moreover, if we take the total period of confinement in the cars, boats, and vessels of the company,

Of course the question before us on this writ is the correctness of the judgment, and if it may properly be supported upon any ground we should affirm it. The company asks for affirmance upon two grounds—(1) for the reasons given by the district judge, and (2) because no evidence was offered that the company had knowingly and willfully failed to comply with the statute. It is not necessary to consider the first ground, as the second seems to us amply sufficient to support the judgment. We have carefully considered the relevant evidence, which was given by several witnesses whose testimony is not referred to in the foregoing summary quoted from the Government's brief. None of them had any recollection about the particular car in question; their evidence was mainly devoted to proving the orders in force upon the subject of feeding animals in transit, the means provided by the company for carrying such orders into effect, and the course of conduct customarily followed at the yards in question. This evidence bore also upon the possibility or probability that such of the company's servants as were charged with the particular duty involved in the suit had failed for some reason to give the animals food. It appeared that thousands of animals of one kind and another reached the company's yards at Jersey City in the course of a year, but there is no suggestion of any other failure to comply with the law. It would serve no good purpose to detail what the witnesses said upon the foregoing subjects. It is enough to say, we think, that a careful examination of the stenographer's notes has satisfied us that the evidence can go no farther than to establish negligence in the care of this particular shipment on the part of one or more of the company's servants. The verdict requires us to assume that the lambs were not fed within the statutory period, but we repeat that in our opinion the fact is accounted for by negligence and can not be attributed to a "knowing and willful" disregard of duty.

These words mean something more than "negligent." A knowing and willful omission to perform a duty is not, as we think, the same as a merely careless omission. For example, let us suppose that the man whose duty it was to feed these lambs had learned the length of their confinement from the car accompanying the shipment, but that his attention had been diverted so that he forgot his task until the

it only amounts to 25 hours and 45 minutes, made up of 21 hours' confinement in its cars and 4 hours and 45 minutes on its barge, which hours of confinement, furthermore, were not consecutive, as provided by the act.

The act neither in terms nor by necessary intendment embraces the case in question. Indeed, its language prohibits the construction which the Government seeks to put upon it. If Congress had intended to cover a situation like that here presented, it could easily have done so by prohibiting the confinement in any manner of animals being transported in interstate commerce for a period longer than 28 hours without feeding, watering, and resting them, etc. Confessedly, my inclination has been to so construe the act, if possible, as to make it cover the case in question; but it can not be done, in my judgment, without an exercise of the legislative, rather than the judicial, function.

period limited by the statute had passed. No doubt this would be negligence, but to call it a "willful" failure of duty seems to contradict one of the essential facts supposed. It is not possible to omit an act knowingly and willfully, unless the act be consciously in the mind; if it be no longer in the mind, it can not be within the range of either knowledge or intention.

In the absence of better evidence on the subject than was offered by the Government, the presumption that the company did its duty and obeyed the statute must prevail. There is really nothing to rebut it except another and a weaker presumption, namely, the presumption that the lambs were not fed because no report of their feeding appears in the company's records. We say that this presumption is weaker, because it is evident that the absence of the report is susceptible of at least three explanations: (1) That some one knowingly and willfully failed to feed the animals; or (2) that such failure was merely negligent; or (3) that they really had been fed although the fact had not been reported. With the evidence in this condition there was nothing to be submitted to a jury.

The courts have not fully agreed in their efforts to define the words under consideration, but we are disposed to adhere to the opinion, that "knowingly and willfully" is not synonymous with "negligently." Without quoting from the following cases, we refer with approval to *United States v. Union Pacific R. R. Co.* (C. C. A.), 169 Fed., 65; *St. Louis, &c., Co. v. United States* (C. C. A.), 169 Fed., 69; *United States v. Stock Yards Terminal Co.* (C. C. A.), 178 Fed., 19; *St. Joseph Stock Yards Co. v. United States* (C. C. A.), 187 Fed., 104; *Chicago, &c., Co. v. United States* (C. C. A.), 194 Fed., 342; *United States v. Sioux City Co.* (C. C.), 162 Fed., 556; *United States v. Atchinson, &c., Co.* (D. C.), 166 Fed., 160. For a somewhat different view, see *New York, &c., Co. v. United States* (C. C. A.), 165 Fed., 833, and *United States v. Atlantic, &c., Co.* (C. C. A.), 173 Fed., 764.

The judgment is affirmed.

(Received and filed May 5, 1913.)



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 76.

FRANCIS G. CAFFEY, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Supreme Court of the United States, reversing the decree of the Supreme Court of the District of Columbia, in a proceeding by way of libel for condemnation and forfeiture under section 10 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768).

SUPREME COURT OF THE UNITED STATES.

No. 118.—OCTOBER TERM, 1913.

THE UNITED STATES OF AMERICA, PLAIN- tiff in Error and Appellant,	} In error to and appeal from the Court of Ap- peals of the District of Columbia.
The Antikamnia Chemical Company.	

[January 5, 1914.]]

Mr. Justice McKENNA delivered the opinion of the Court.

Libel for the seizure and condemnation of certain drugs under the provisions of the act of Congress of June 30, 1906, commonly known as the Food and Drugs Act (34 Stat., 768).

The libel alleges that the drugs are in the possession and custody of The Wholesale Drug Exchange, a body corporate, at a numbered place in the City of Washington.

The drugs, it is alleged, are intended to be used for the cure and mitigation and prevention of diseases of man. They are described as follows:

"Twenty packages, more or less, of said drug, labelled and branded as follows: 'Antikamnia Tablets, Contain 305 grains of acetphenetid, U. S. P. per ounce, Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30, 1906, U. S. Serial Number 10. The Antikamnia tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha, or beta eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate, Antikamnia tablets five grains. One ounce Antikamnia Tablets. Manufactured

in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A.'

"Also seventy other packages, more or less, of said drug, labelled and branded as follows: 'Antikamnia and Codein Tablets. Contain 296 grains acetphenetidin, U. S. P. per ounce. Contain 18 grains sulph. codein per ounce. Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30, 1906. U. S. Serial Number 10. The Antikamnia and Codein tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, heroin, cocaine, alpha, or beta eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Codein Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A.'

"Also ten other packages, more or less, of said drug, labelled and branded as follows: 'Antikamnia and Quinine Tablets. Contain 165 grains acetphenetidin, U. S. P. per ounce. Guaranteed by the Antikamnia Chemical Company under the Food and Drugs Act, June 30, 1906, U. S. Serial Number 10. The Antikamnia and Quinine Tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha, or beta eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Quinine Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A.'"

The ground of confiscation and condemnation alleged is that all of the packages of the drugs contain a large quantity and proportion of acetphenetidin, which, it is alleged, is a derivative of acetanilid, and that under the provisions of the act of Congress and of the regulations lawfully made thereunder it is provided and required that the label on each of the packages shall bear a statement that the acetphenetidin contained therein is a derivative of acetanilid; and yet, it is alleged that each and all of the packages fail to comply with such provisions.

It is also alleged that the packages are further misbranded, in that the labels thereon are false and misleading, for the reason that each and all of them bear the statement that no acetanilid is contained therein, and that the statement imports and signifies that there is no quantity of any derivative of acetanilid contained in the drug.

A warrant of arrest was issued upon which the marshal duly made return that he had arrested twenty packages of Antikamnia tablets, ten packages of Antikamnia quinine tablets and sixty-three packages labeled "Antikamnia and Codein Tablets," and otherwise duly executed the warrant.

The Antikamnia Chemical Company, appellee and defendant in error, alleging itself to be the owner of the drugs, petitioned to be made a defendant in the libel. The petition was granted, and the company thereupon filed the exceptions to the libel. The exceptions negative in detail the charges of the libel and assert conformity in

the labelling of the packages to the act of Congress of June 30, 1906, quoting its 8th section as follows: “* * * or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha, or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein.” And it is averred that the act does not provide that there should be added to any derivative of any of the substances contained therein the name of the parent substance, and the act cannot be added to or enlarged by requiring the company to add to the name of a known article, the fact that the article is a derivative of any of the substances mentioned in the act. It is averred, therefore, that the packages are not misbranded and that the statement on the labels that no acetanilid is contained therein is in no way false or misleading because the libel does not allege that there is acetanilid in the packages, and, therefore, the statement instead of being false and misleading is, according to the allegations of the libel, true.

The exceptions were sustained and the libel dismissed.

It was stipulated that Food Inspection Decision No. 112, issued January 27, 1910 by the United States Department of Agricultural was considered by the court upon the hearing of the cause and should be included in and be considered part of the record on appeal.

The decision quotes section 8 of the act, states that the Attorney General, in an opinion rendered January 15, 1909, held that a derivative is a substance so related to one of the specified substances “that it would be rightly regarded by recognized authorities in chemistry as obtained from the latter ‘by actual or theoretical substitution,’ and it is not indispensable that it should be actually produced therefrom as a matter of fact;” further that the labeling of derivatives, as prescribed by section 8, is a proper subject conferred upon the department by section 3, and that a rule or regulation requiring the name of the specified substance to follow that of the derivative would be in harmony with the general purpose of the act, and an appropriate method by which to give effect to its provisions.

In conformity to this opinion, Regulation 28 of the Rules and Regulations for the enforcement of the Food and Drugs Act was amended as follows: “* * * Acetanilide (antifebrine, phenylacetamide) Derivatives—Acetphenetidine, * * * (g) In declaring the quantity or proportion of any of the specified substances the names by which they are designated in the act shall be used, and in declaring the quantity or proportion of the derivatives of any of the specified substances, in addition to the trade names of the derivative, the name of the specified substance shall also be stated, so as to indicate

clearly that the product is a derivative of the particular specified substance."

The decree of the Supreme Court of the District dismissing the libel was affirmed by the Court of Appeals.

The case is not in very broad compass, though the arguments of counsel are somewhat elaborate. The libel is prosecuted for the condemnation of one hundred packages of Antikamnia tablets as being misbranded in violation of the Food and Drugs Act of June 30, 1906, 34 Stat. 768. The tablets contain acetphenetidin and the labels so state, and the proportion of the substance. It is a derivative of acetanilid, but the labels do not so state but do state that the tablets contain no acetanilid. And these omissions, it is contended by the Government, constitute a violation of the statute and of Regulation No. 28 as amended. The chemical company contends that the first statement is not required by the law and that the second statement is true, and therefore can not be false or misleading.

Preceding the discussion of these contentions a question of jurisdiction is presented by the chemical company and a motion to dismiss is made on the ground that only the construction of the statute is involved in the decision of the court below. The company also moves for an affirmance of the judgment on the ground that the appeal is frivolous. *Contra* the Government contends that the Court of Appeals held invalid the regulation requiring the name of the primary substance as well as that of the derivative to be stated on the label; and that there is not only drawn in question, but so far denied, an authority exercised under the United States. We concur in this view. The validity of the regulation was and is denied. Its validity may, indeed, rest on the statute, but so did the validity of the rule of the Patent Office passed on in *Steinmetz v. Allen* (192 U. S., 543.) We there said of a rule of practice established by the Commissioner of Patents under a section of the Revised Statutes, "It thereby became a rule of procedure and constituted, in part, the powers of the primary examiner and Commissioner. In other words, it became an authority of those officers, and, necessarily, an authority 'under the United States.' Its validity was and is assailed by plaintiff in error. We think, therefore, we have jurisdiction, and the motion to dismiss is denied." *United States ex rel. Taylor v. Taft, Secretary of War* (203 U. S., 461) is not in antagonism to this ruling. In that case the relator was dismissed from the public service by an order of the Secretary of War as representative of the President. She sought restoration by mandamus. It was denied and she brought the case to this court on the ground that the validity of an authority exercised under the United States

was drawn in question. Dismissing the case, this court said that as she did not question the authority of the President or his representative to dismiss her but contended only that certain rules and regulations of the civil service had not been observed, the validity of an authority exercised under the United States was not drawn in question but only the construction and application of regulation of the exercise of such authority. *Steinmetz v. Allen* was said not to be contrary, "for there the validity of a rule constituting the authority of certain officers in the Patent Office was drawn in question."

Motion to dismiss is denied.

Joined with the motion to dismiss, we have seen, was a motion to affirm on the ground that the question of the authority of the Secretaries to make the regulation is frivolous in view of the decisions in *United States v. Grimaud* (220 U. S., 506), *Williamson v. United States* (207 U. S., 425) and other cases. How far this contention is tenable will be developed as we proceed with the consideration of the act and the power of the Secretaries under it.

The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.

Section 3 gives the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor, power to "make uniform rules and regulations for carrying out the provisions" of the act and the power to collect specimens of foods and drugs offered in interstate and foreign commerce. It adopts the definitions of the United States Pharmacopoeia or National Formulary and provides (section 8) that the term "misbranded" as used in the act "shall apply to all drugs * * * the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular." And, further, in case of drugs, an article shall be deemed to be misbranded "if the package fail to bear a statement on the label of the quantity or proportion" of certain enumerated substances "or acetanilid, or any derivative or preparation of any such substances contained therein."

These are the applicatory provisions. How are they to be construed?

First, as to the power of the Secretaries. It is undoubtedly one of regulation only—an administrative power only—not a power to alter or add to the act. The extent of the power, however, must be determined by the purpose of the act and the difficulties its execution might encounter. The fact that a council of three Secretaries of governmental departments was given power to make the rules and regulations for the execution of the law shows how complex the matters dealt with were considered to be, and the care that was necessary

to be taken to guard against their defeat or perversion. The composition of drugs is a matter of technical skill, their denomination often by words of scholastic origin, conveying no meaning to the uninformed, their uses and abuses learned only by experience, beneficial or evil. It was this experience that the law sought to avail itself of and to avail itself against the ever increasing powers of the laboratory or the disguises of a technical nomenclature. Hence the provision of the law that the term "drug" as used in the act shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and hence also the provision that a drug or food product is misbranded in case it fails to bear a statement on the label of the quantity or proportion of certain enumerated substances, including acetanilid, "or any derivative or preparation of any such substance contained therein." Experience had demonstrated the quality of those substances, their effects had become common knowledge; their names, therefore, were all the warning it was necessary for the law to give. But derivatives of them might, probably would, be of their quality, so derivatives of them were to be guarded against, and the law hence further provided that the labels on them should state the "quantity or proportion" of "any derivative or preparation" of them. This much is clear—there is no obscurity in the words and purpose of the law. The query then occurs, such being the words and purpose, if the quantity or proportion of the substances or any derivative or preparation of them must be stated, is it administrative of the law or additive to it to require by regulation that not only the name of the derivative or preparation be stated but from what substance derived or of what it is a preparation? It certainly cannot be said that the purpose of the law is not exactly fulfilled by the regulation. If it fulfills the purpose of the law it cannot be said to be an addition to the law, unless, indeed, it can be contended that the law provided a means for its defeat by the easy device of mysterious names. There is illustration in the present case. What information does the use of the word "acetphenetidin" convey to anybody of its good or evil origin? If it be said that the like question may be asked of any of the primary substances, we reply that they are the precautions of the law and adopted as such because they had demonstrated themselves, the value of their use, the detriment of their abuse, and it was believed that their names would carry no deception.

But let us turn from the power of the Secretaries to the law itself and inquire if it needs the assistance of a regulation. It is the contention of the Government that it does not, that its requirement that the primary substances should be labelled and that their derivatives should be labelled means, necessarily, that it should be stated of what they are the derivatives to make the warning of the labels

complete. A great deal of what we have said in discussing the power of the Secretaries applies to this contention and supports it. The purpose of the law is the ever insistent consideration in its interpretation. The purpose is to prevent the surreptitious sale of certain noxious drugs or their derivatives, the latter supposedly partaking of the quality of parent article and as effective of evil consequences. This being the purpose, did the law leave it unexecuted? We cannot attribute to it such defect, and a serious defect it might be. Nor can we consider as a case of omission that which involves so definitely the mischief which was intended to be redressed and which is fairly within the language of the law. And we say this without regard to the various illustrations contained in the Government's brief of the deceptions which can be practiced by using the name of the derivative alone, for the chemical company insists that we may not, in the absence of allegations and proof, look for knowledge in the encyclopedias, or medical lexicons or to trade practices for trade disguises, actual or possible. It is not necessary to enter upon the challenged ground. The law furnishes its own tests of what the labels should reveal, and we may grant, for the argument's sake, as contended, that it has penal character; but this does not mean that it should not be given its reasonable intendment. There is no harshness in this either to the manufacturer or the seller of drugs. They surely know what they make or vend—know whether it is primary or of what a derivative—and the law requires only that they put their knowledge on the labels for the information of purchasers. No serious burden is thereby imposed on honest business. Indeed, it makes the label on the packages an assurance as well as a warning and benefits all concerned, manufacturer, seller and purchaser. And this in the interest of the public health.

Decree reversed and cause remanded with direction to reverse the decree of the Supreme Court and remand the cause with direction to overrule the exceptions to the libel.



Issued March 5, 1914.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 77.

FRANCIS G. CAFFEY, Solicitor.

THE TWENTY-EIGHT HOUR LAW.

Opinion of United States District Court for the District of North Dakota in a case involving an alleged violation of the act of June 29, 1906 (34 Stat., 607).

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT
OF NORTH DAKOTA, SOUTHEASTERN DIVISION.

THE UNITED STATES OF AMERICA, *Plaintiff*,
v.
NORTHERN PACIFIC RAILWAY COMPANY, *Defendant*. }

AMIDON, *District Judge*:

This is a suit by the Government to recover penalties for violations of the 28-hour law in connection with the shipment of sixteen carloads of sheep from Columbus, Montana, to Chicago, Illinois. The case is submitted on complaint and answer. From these pleadings it appears that the sheep were received at 4.30 p. m. on February 25, and arrived at Mandan, North Dakota, on February 26, at 8.45 p. m. It was then night time, and dark. The hereditary terror of sheep at any disturbance in the night makes it impossible to unload them at that time. An attempt was made to unload this shipment, but after working until midnight, and succeeding in getting only four cars unloaded, the work was suspended until the break of day the next morning, when it was resumed and the shipment completely unloaded at 7.35 a. m. of February 27. From this it appears that the greater part of the shipment was kept confined in the cars for more than thirty-six hours. Properly executed instruments had been signed by the shipper, permitting their confinement for the latter period. The defendant invokes the last proviso of section 1, of the act of June 29, 1906, 34 Stat. at Large, 608, which reads as follows:

Provided that it shall not be required that sheep be unloaded in the night time, but where the time expires in the night time in case of sheep, the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

It asks that this proviso be read in connection with the earlier clause of the section which enacts that "in estimating such confinement, the time consumed in loading and unloading shall not be considered," and insists that a proper construction of this language exempts it from liability. It seems to me that under the interpretation of the section which has now been adopted by the courts the defence must fail. The only effect of the proviso in regard to sheep is this: It protects the carrier against unloading sheep in the night time to the extent of extending the period of confinement from twenty-eight hours to thirty-six hours, as a matter of law, and without any written consent on the part of the shipper. In no case, however, does it extend the time for which sheep may be confined beyond the limit of thirty-six hours. The phrase "subject to the aforesaid limitation of thirty-six hours" goes back to all the previous language of the proviso, and thus limits the words "it shall not be required that sheep be unloaded in the night time." The result of the proviso is that the carrier is not required to unload sheep in the night time if he can in daylight commence unloading them within the thirty-six hour limit and steadily carry forward that work to completion. But if he can not do this, then the night is no protection to him, and it is his duty to comply with the requirements of the statute before the night comes on. He must also take notice of the fact that sheep can not be unloaded in the night time. (*United States v. Atchison, T. & S. F. Ry. Co.*, 185 Fed., 105; *Southern Pacific R. R. Co. v. United States*, 171 Fed., 360; *United States v. Atchison, T. & S. F. Ry. Co.*, 166 Fed., 160.)

Nor can the language excluding the time consumed in unloading avail the defendant. That exemption requires a continuous unloading of the animals. If the work is commenced before the limit expires, or at its expiration, and is carried on with reasonable dispatch until the shipment is unloaded, the time thus consumed is no part of the limitation. The statute, however, is directed at the confinement of the animals without food, drink, and rest, and this covers confinement in cars in the yard the same as in cars during transit. Confinement beyond the permitted period is illegal, unless the work of unloading is actually in progress. Merely waiting for a suitable time to unload is not unloading. If this were not so, the cruelty which the statute was intended to prevent could be inflicted with impunity, provided only the animals were kept confined in the cars standing in the yard where they were finally unloaded.

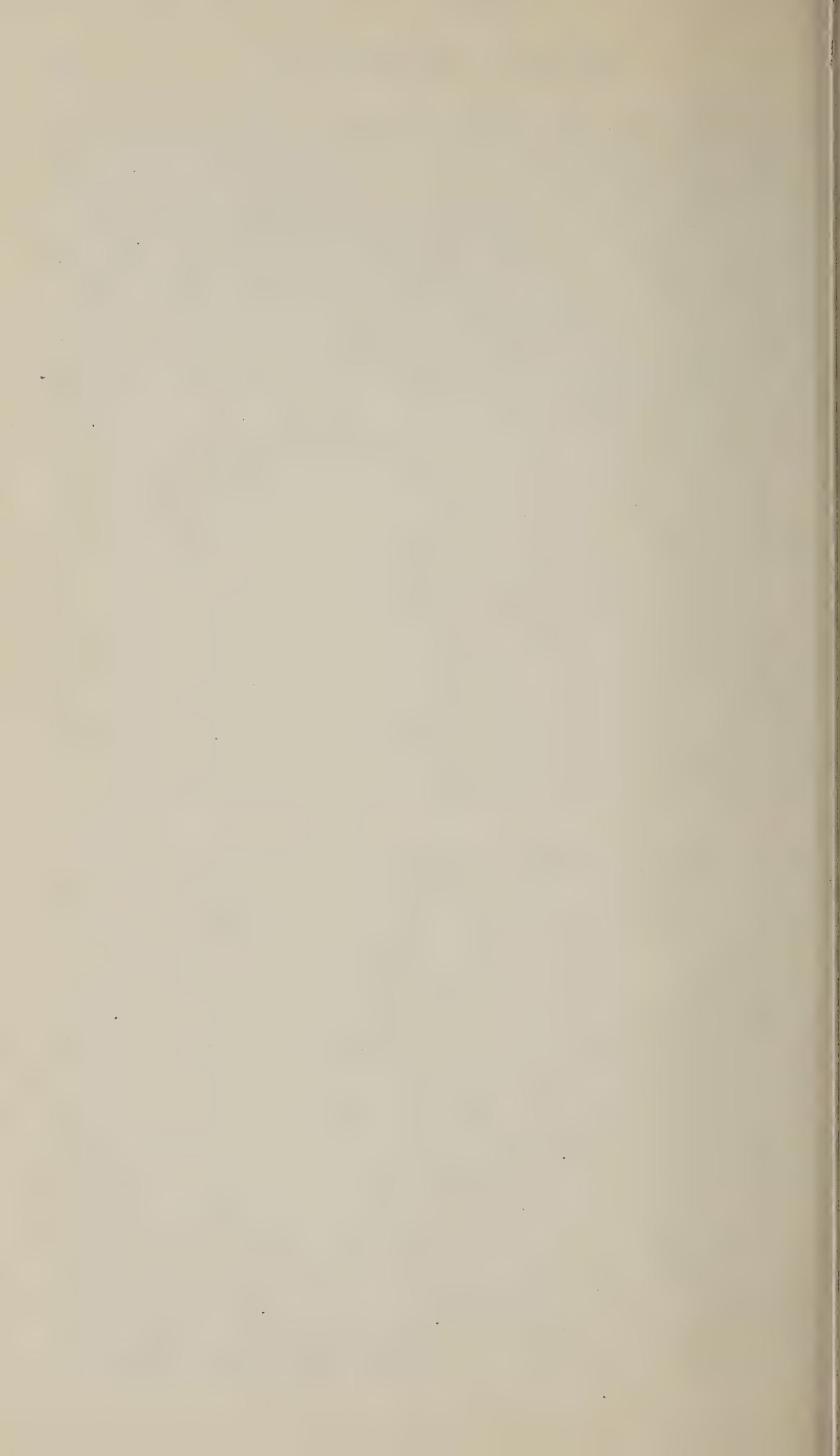
Counsel for the defendant also invokes the rule declared by the Supreme Court in *Baltimore & Ohio Southwestern R. R. Co. v. United States* (220 U. S., 94), and says that inasmuch as only one penalty can be imposed for the entire shipment, and as a part of the shipment was unloaded within the thirty-six hour limit, that no

penalty whatever ought to be imposed as to the balance of the shipment which was kept confined for the illegal period. I can not accept that application of the decision. If only one penalty can be imposed for the entire shipment, certainly the penalty is incurred if the entire shipment is not unloaded within the time fixed by the statute. The defendant here kept twelve cars of sheep confined beyond the thirty-six hour limit, and the fact that it did not keep the other four cars confined certainly can not avail as a condonation for the illegal confinement of the twelve cars.

The penalty will be fixed at \$200.00, and judgment be entered in favor of the plaintiff for that amount.

Dated January 28, 1914.

○



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 78.

FRANCIS G. CAFFEY, Solicitor.

THE FOOD AND DRUGS ACT.

SYLLABUS.¹

1. Water taken from a spring at Buffalo Lithia Springs, Mecklenburg County, Va., and labeled "Buffalo Lithia Water Springs No. 2 . . . Buffalo Lithia Springs Water, Nature's Materia Medica," with numerous statements on the label concerning the alleged efficacy of such water as a therapeutic agent, *held* misbranded because said water did not contain a sufficient amount of lithium to entitle it to be called lithia water.

2. The term "lithia water," as ordinarily understood, means a water containing a sufficient amount of lithium to give a therapeutic effect when drunk in reasonable quantities.

3. In the absence of a standard for lithia water, it is reasonable to suppose that such water should contain at least a weighable amount of lithium in a potable quantity of water. Water containing only one grain of lithium in 10,000 grains of water is misbranded if labeled "lithia water."

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A DISTRICT COURT.

UNITED STATES OF AMERICA, LIBELANTS,	}	District No. 928. Decided February 16, 1914.
vs.		
SEVEN CASES, MORE OR LESS, OF "BUFFALO LITHIA Water."		

OPINION OF THE COURT.

GOULD, *J.* The original bill in this case was filed December 21, 1910. It sought to condemn seven cases of bottles containing water labeled as "Buffalo Lithia Water," on the ground that they were misbranded and thereby violated the act of June 30, 1906, the misbranding being alleged to consist of statements that the liquid was a lithia water, whereas it did not contain an appreciable amount of lithium, and would not give the therapeutic effect of lithium when a reasonable quantity was consumed, and, further, that the water was not a lithia water, or entitled by reason of its ingredients to be so called. The libel also alleged, as a further misbranding, that the bottles were offered for sale under the distinctive name of lithia water, when in fact it was not lithia water, and that the bottles were labeled and branded so as to deceive and mislead the purchaser thereof.

A demurrer having been sustained to this libel on April 6, 1912, an amended libel was filed April 6, 1912, omitting the original allegation that the water did "not con-

¹ Not by the court.

tain an appreciable amount of lithium, and will not give the therapeutic effect of lithium when a reasonable quantity" is consumed. A demurrer to the amended libel was overruled June 13, 1912, whereupon the claimants, on December 12, 1912, filed their answer denying that the water was misbranded. Upon the issue thus joined, voluminous testimony has been taken in different parts of the country. The questions of fact involved have, by agreement, been submitted to the court sitting as a jury.

It is somewhat difficult to accurately describe the label as it is voluminous, but the most striking feature of it are the words "Buffalo Lithia Water Springs No. 2," in white letters, relatively large, on a blue field, surrounding the figure of a draped woman, in a sitting posture, holding an urn on her lap, and herself surrounded by the words in much smaller type "Buffalo Lithia Springs Water, Nature's Materia Medica." Beneath the foregoing, in smaller but plain type is the following: "This water is indicated in all affections due to the Uric Acid Diathesis—Gout or Rheumatism in all their forms, Stone in the Bladder, Kidneys or Liver, Bright's Disease and Kidney Diseases of every form, Albuminuria of Pregnancy or Scarlet Fever, Uraemia and its accompanying troubles, Menstrual Irregularities, Acid Dyspepsia, Nervous Disorder in all its forms, Malarial Fevers, and in the preparation of Artificial Food for Infants. Dose. From six to eight glasses of the ordinary size per day is the average dose. Many persons, however, take a larger quantity." At the bottom of the label are the words "Buffalo Lithia Springs Water Co., Buffalo Springs, Virginia." At the top are the words "Guaranteed under the Food and Drugs Act, June 30, 1906."

It is admitted by the Government that the water in controversy is a natural spring water taken from a spring known as "Buffalo Lithia Springs" situated at Buffalo Lithia Springs, in Mecklenburg County, Virginia. It is also admitted that the claimants, or their predecessors, have been continuously shipping and selling this water from this spring since 1878 under the label or brand "Buffalo Lithia Water."

There is little dispute as to the essential facts of the case. Naturally the first question which the controversy suggests, is, what is a "lithia water." There appears to be no definition given by the Pure Food Act or by the United States Pharmacopoeia as to the quantity of lithium which a given amount of water must contain in order to reasonably entitle it to be designated "lithia" water. The Government has offered the testimony of chemists, pharmacologists, physicians and druggists to the effect that the common understanding is that a natural lithia water is one that contains enough lithium so that when a reasonable quantity is consumed a physiological or therapeutic effect would be obtained in consequence of the lithium content. This appears not only to be a fair and reasonably accurate definition, one which appeals to the common sense and understanding of a nonscientific person, but is supported by the overwhelming weight of the testimony in the case. Speaking generally, and as an individual of average intelligence and information, it would seem that if one were offered a water which the vendor told him was a "lithia" water, one would have the right to expect enough lithium in the water to justify its characterization as such, thus differentiating it from ordinary potable water; and this amount would reasonably be expected to have some effect upon the consumer of the water by reason of the presence of the lithium.

This is especially true in view of the fact that lithium has been quite commonly believed to have a therapeutic effect on physical ailments which may be classified generally under the head of the uric acid diathesis.

The second question which also arises quite naturally is as to the actual lithium content in a given quantity of the water in controversy. Several analyses were offered in evidence, made by both the Government and by the claimants. As these differ, so slightly, in respect to the amount of lithium found in a given quantity of water, those made by the Government will be taken as accurate. In addition, the evidence is uncontradicted that the analyses made by the Government experts were made according to the most improved methods, and no attempt was made to impugn their accuracy or fairness.

Dr. Collins, an expert chemist employed in the Bureau of Chemistry, examined three samples of the water in controversy, two of which were part of the water seized. He gives in great detail every step taken by him in his analyses to determine the quantity of lithium. The result was that in two litres of the water (about two and one-fifth quarts) he found no weighable amount of lithium. That is, a chemical analysis showed absolutely no appreciable amount of lithium in the bottle of water of the size usually sold. By the use of the spectroscope, however, it was found that there was two-thousandths of a millogram in a litre; that is, about one ten-thousandth of a grain per gallon of water, or one grain in ten thousand gallons of water. To further illustrate the infinitesimal quantity of lithium in this water, it was testified that the average dose of lithium as a uric acid solvent was from five to seven and a half grains three times a day. So that, for a person to obtain a therapeutic dose of lithium by drinking Buffalo Lithia Water he would have to drink from one hundred and fifty thousand to two hundred and twenty-five thousands gallon of water per day. It was further testified, without contradiction, that Potomac River water contains five times as much lithium per gallon as the water in controversy.

It has already been stated that the claimants made no question as to the accuracy of the Government analysis; it might be added that their own latest analysis, by the Lederle Laboratories in New York City, showed only a spectroscopic trace of lithium in the water.

The Government also produced pharmacologists and physicians, eminent in their professions, who testified that the amount of lithium disclosed in this water, either singly, or in combination with the other elements contained in it, could not, by any possibility, have any physiological or therapeutic effect upon the consumer.

It is concluded, therefore, that a person drinking Buffalo Lithia Water for the hoped for benefit he may derive from the lithium in it, is deceived and misled, because a potable quantity contains no appreciable lithium.

Moreover, this deception is increased and aggravated by the language on the label accompanying its designation as "Buffalo Lithia Water." Lithium is supposed to be a solvent for uric acid, to prevent the formation of calculi and to remove it from the system in rheumatism and gout. The label, immediately under the large letters "Buffalo Lithia Water," and in the center of the label, contains this language: "This water is indicated in all affections due to the Uric Acid Diathesis—Gout or Rheumatism in all their forms, Stone in the Bladder, Kidneys or Liver, Albuminaria of Pregnancy or Scarlet Fever, Uraemia and its accompanying troubles, Menstrual irregularities, Acid Dyspepsia, Nervous Disorders in all its forms, Malarial Fevers, and in the preparation of Artificial Food for Infants." The word "indicated" as a medical term, as defined by Webster, means "to point as to the proper remedy." The Uric Acid Diathesis means the class of diseases due to the presence of an excess of Uric Acid. So that the purport and effect of the label to a purchaser is to tell him that this water, by reason of the lithium in it, is the proper remedy for those diseases which are due to uric acid of which lithia is a solvent.

It becomes pertinent to notice the attitude of the Courts towards labels of this character, irrespective of the Pure Food Act.

Where the manufacturer of a liquid laxative medicine to which he gave the name of "syrup of figs" and who had spent vast sums in advertising it, sought to enjoin another from using the name, it was held that he was not entitled to the injunction because he falsely represented to the public that the juice of the fig was the important medicinal agent in the composition of the medicine, when in fact only a suspicion of fig juice was put into it, and the real laxative was senna. This was so held notwithstanding there was much evidence showing that it was a very useful medicine and prescribed by physicians of high standing. In deciding the case Judge Taft said: "This is a fraud upon the public. It is true it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is nevertheless of such a character that a court of equity will not encourage it by extending any relief to the

person who seeks to protect a business which has grown out of and is dependent upon such deceit." *California Fig Syrup Co. v. Frederick Stearns & Co.*, 73 Fed. 812.

This case was subsequently approved and followed by the Supreme Court in *Worden v. California Fig Syrup Co.*, 187 U. S. 519.

The same principle was applied in the cases of *Memphis Keeley Institute v. Leslie E. Keeley Co.* (C. C. A. Sixth Circuit) 155 Fed. 964, and *Bear Lithia Springs Co. v. Great Bear Spring Co.*, 71 N. J. Eq. 595.

If the courts assume this attitude towards falsely labelled articles under the general rules of law and equity, a fortiori should they assume it in applying a statute, such as the Pure Food Act, which has for its objects "not only to protect the public from unwholesome food and drink, but to require that any article of food, drink or medicine sold *shall be correctly described by its label.*" *U. S. v. Morgan, et al.*, 181 Fed., 587.

In the very able oral argument and elaborate brief of claimant's learned counsel, there are two main contentions:

1st. They deny that the label represents that the contents of said bottles is a "lithia water." They insist that the label distinctly states that the contents of the bottles is that "particular natural mineral water known both as Buffalo Lithia Water and Buffalo Lithia Springs Water, and was taken" from the Buffalo Lithia Springs No. 2, etc.

In other words, the argument seems to be that if Buffalo Lithia Springs are falsely named, being called "Lithia" Springs, when they do not flow water containing lithium, therefore the proprietors have the right to sell the product as being Buffalo Lithia Springs Water, thus perpetuating upon the public the misnomer connected with the origin of the water. It is not apparent how the deceit practiced upon the public by the label is mitigated by carrying it back to the designation of the Spring from which the water comes.

2nd. It is next contended that if the word "lithia," as used on the label can be construed to represent that the contents of the bottles is "lithia water," such representation would not be false or misleading, within the purview of the Food and Drugs Act, because the contents of the bottles is a lithia water as the term is understood in the English language, viz, a natural spring water containing "some lithia" or "a trace of lithium."

Assuming that the term lithia water requires only "some" lithium in the water, it would seem that even that flexible term should not be attenuated to include a water which contained only one ten-thousandth of a grain in a gallon, and in which even a trace in two litres could only be ascertained by the use of the spectroscope. But the evidence in the case is overwhelming that the term lithia water, as ordinarily understood, means a water containing a sufficient amount of lithium to give a therapeutic effect when drank in reasonable quantities. It is true that the Food and Drug Act does not prescribe the quantity of lithium that a water should contain to entitle it to the name "lithia water." But that this is not a fatal objection to the law has been frequently held. *Shawnee Milling Co. v. Temple*, 179 Fed. 517; *United States v. Sacks of Flour*, 180 Fed. 518.

And, even if a standard were fixed as to the quantity which would entitle a water to such designation, it is reasonable to suppose that it would require at least a weighable or appreciable amount in a potable quantity of water.

It is also argued that no natural water, designated as lithia water, contains sufficient lithium to give a therapeutic effect by drinking a reasonable quantity. The evidence is not quite clear on this question; but the most it would prove would be the misbranding of other so-called lithia waters.

It is therefore concluded that the statement "Buffalo Lithia Water," on the labels on the bottles seized, is false and misleading within the meaning of the first general paragraph of Section 8 of the Food and Drug Act, and judgment will be accordingly entered for the libellant.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 79.

FRANCIS G. CAFFEY, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Supreme Court of the United States affirming the judgment of the Circuit Court of Appeals for the Eighth Circuit, which reversed a decree of the District Court for the Western District of Missouri condemning and forfeiting 625 sacks of flour seized under section 10 of the Food and Drugs Act of June 30, 1906 (34 Stat. 768).

SUPREME COURT OF THE UNITED STATES.

No. 548.—OCTOBER TERM, 1913.

THE UNITED STATES OF AMERICA, PETITIONER.	} On writ of certiorari to the United States Circuit Court of Ap- peals for the Eighth Circuit.
vs.	
LEXINGTON MILL & ELEVATOR COMPANY.	

[February 24, 1914.]

Mr. Justice DAY delivered the opinion of the Court.

The petitioner, the United States of America, proceeding under section 10 of the Food & Drugs Act (34 Stat. 768), by libel filed in the District Court of the United States for the Western District of Missouri, sought to seize and condemn 625 sacks of flour in the possession of one Terry, which had been shipped from Lexington, Nebraska, to Castle, Missouri, and which remained in original, unbroken packages. The judgment of the District Court, upon verdict, in favor of the Government, was reversed by the Circuit Court of Appeals for the Eighth Circuit (202 Fed. 615), and this writ of certiorari is to review the judgment of that court.

The amended libel charged that the flour had been treated by the "Alsop Process", so called, by which nitrogen peroxide gas, generated by electricity, was mixed with atmospheric air and the mixture then

brought in contact with the flour, and that it was thereby adulterated under the fourth and fifth subdivisions of section 7 of the act, namely, (1) in that the flour had been mixed, colored and stained in a manner whereby damage and inferiority was concealed and the flour given the appearance of a better grade of flour than it really was, and (2) in that the flour had been caused to contain added poisonous or other added deleterious ingredients, to-wit, nitrites or nitrite reacting material, nitrogen peroxide, nitrous acid, nitric acid and other poisonous and deleterious substances which might render the flour injurious to health. The libel also charged that the flour was adulterated under the first subdivision of section 7, and was misbranded; but the Government does not urge these features of the case here. The verdict was broad enough to cover the charge under the first subdivision of section 7, but in the view we take of the case as to the instruction of the court under subdivision 5 need not be noticed.

The Lexington Mill & Elevator Company, the respondent herein, appeared, claiming the flour, and answered the libel, admitting that the flour had been treated by the Alsop Process, but denying that it had been adulterated and attacking the constitutionality of the act.

A special verdict to the effect that the flour was adulterated was returned and judgment of condemnation entered. The case was taken to the Circuit Court of Appeals upon writ of error. The respondent contended that, among other errors, the instructions of the trial court as to adulteration were erroneous and that the act was unconstitutional. The Circuit Court of Appeals held that the testimony was insufficient to show that by the bleaching process the flour was so colored as to conceal inferiority and was thereby adulterated within the provisions of subdivision 4. That Court also held—and this holding gives rise to the principal controversy here—that the trial court erred in instructing the jury that the addition of a poisonous substance, in any quantity, would adulterate the article, for the reason that “the possibility of injury to health due to the added ingredient and in the quantity in which it is added, is plainly made an essential element of the prohibition.” It did not pass upon the constitutionality of the act, in view of its rulings on the act’s construction.

The case requires a construction of the Food and Drugs Act. Parts of the statute pertinent to this case are:

“Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * *

“In case of food:

“First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

* * * * *

“Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.

* * * * *

"Sec. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct."

Without reciting the testimony in detail it is enough to say that for the Government it tended to show that the added poisonous substances introduced into the flour by the Alsop Process, in the proportion of 1.8 parts per million, calculated as nitrogen, may be injurious to the health of those who use the flour in bread and other forms of food. On the other hand, the testimony for the respondent tended to show that the process does not add to the flour any poisonous or deleterious ingredients which can in any manner render it injurious to the health of a consumer. On these conflicting proofs the trial court was required to submit the case to the jury. That court, after stating the claims of the parties, the Government insisting that the flour was adulterated and should be condemned if it contained any added poisonous or other added deleterious ingredient of a kind or character which was capable of rendering such article injurious to health; the respondent contending that the flour should not be condemned unless the added substances were present in such quantity that the flour would be thereby rendered injurious to health, gave certain instructions to the jury. Part of the charge, excepted to by the respondent, reads:

"The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food, such as ham, bacon, fruits, certain vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the Government need not prove that this flour or food-stuffs made by the use of it would injure the health of any consumer. It is the character—not the quantity—of the added substance, if any, which is to determine this case."

On the other hand the respondent insisted that the law is, and requested the court to charge the jury:

"That the burden is upon the prosecution to prove the truth of the charge in the libel, that by the treatment of the flour in question

by the said Alsop Process it has been caused to contain added poisonous or other added deleterious ingredients, to wit, nitrites or nitrite reacting material, which may render said flour injurious to health.

“And in this connection you are further instructed that it is incumbent upon the Government to prove that any such added poisonous or other added deleterious ingredients, if any contained in said flour, are of such a character and contained in the flour seized in such quantities, conditions and amounts as may render said flour injurious to health, and unless you find that all of such facts are so proven you cannot find against the claimant or condemn the flour in question under that charge in the libel, and if you fail to so find your verdict upon that count or charge in the libel must be in favor of the claimant or defendant.

* * * * *

“The law does not prohibit the adding of nitrites or nitrite reacting material to flour, and a jury cannot find for the Government or against the claimant, even if it be shown that nitrites or nitrite reacting material was added to the flour in question, unless they believe from a preponderance of the evidence that such addition, if any, rendered said flour injurious to the health of those who might consume the bread or other foods made from said flour.”

It is evident from the charge given and refused that the trial court regarded the addition to the flour of any poisonous ingredient as an offense within this statute, no matter how small the quantity, and whether the flour might or might not injure the health of the consumer. At least such is the purport of the part of the charge above given, and if not correct, it was clearly misleading, notwithstanding other parts of the charge seem to recognize that in order to prove adulteration it is necessary to show that the flour may be injurious to health. The testimony shows that the effect of the Alsop Process is to bleach or whiten the flour and thus make it more marketable. If the testimony introduced on the part of the respondent was believed by the jury they must necessarily have found that the added ingredient, nitrites of a poisonous character, did not have the effect to make the consumption of the flour by any possibility injurious to the health of the consumer.

The statute upon its face shows, that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers. If this purpose has been effected by plain and unambiguous language, and the act

is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court. *Lake County v. Rollins*, 130 U. S. 662, 670:

“Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.”

Hamilton v. Rathbone, 175 U. S. 414, 421:

“The cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary.”

Furthermore all the words used in the statute should be given their proper signification and effect; *Washington Market Co. v. Hoffman*, 101 U. S. 112, 115:

“We are not at liberty,” said Mr. Justice Strong, “to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that signification and effect shall, if possible, be accorded to every word. As early as in Bacon’s Abridgment, sec. 2, it was said that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or work, shall be superfluous, void, or insignificant. This rule has been repeated innumerable times.”

Applying these well-known principles in considering this statute, we find that the fifth subdivision of section 7 provides that food shall be deemed to be adulterated: “If it contain any added poisonous or other added deleterious ingredient *which may render such article injurious to health.*” The instruction of the trial court permitted this statute to be read without the final and qualifying words, concerning the effect of the article upon health. If Congress had so intended the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent. It did not do so, but only condemned food containing an added poisonous or other added deleterious ingredient when such addition might render the article of food injurious to the health. Congress has here, in this statute, with its penalties and forfeitures definitely outlined its inhibition against a particular class of adulteration.

It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent upon the Government in order to make out a case to establish that fact. The act has placed upon the Government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the

added poisonous or deleterious substances must be such as may render such article injurious to health. The word "may" is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, "an auxiliary verb, qualifying the meaning of another verb, by expressing ability, * * *, contingency or liability, or possibility or probability." In thus describing the offense Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. It may be consumed, when prepared as a food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the act. This is the plain meaning of the words and in our view needs no additional support by reference to reports and debates, although it may be said in passing that the meaning which we have given to the statute was well expressed by Mr. Heyburn, chairman of the committee having it in charge upon the floor of the Senate (Congressional Record, vol. 40, pt. 2, p. 1131):

"As to the use of the term 'poisonous', let me state that everything which contains poison is not poison. It depends on the quantity and the combination. A very large majority of the things consumed by the human family contain, under analysis, some kind of poison, but it depends upon the combination, the chemical relation which it bears to the body in which it exists as to whether or not it is dangerous to take into the human system."

And such is the view of the English courts construing a similar statute. The English statute provides (s. 3, of the Sale of Food and Drugs Act, 1875):

"No person shall mix, color, * * * or order or permit any other person to mix, color, * * * any article of food with any ingredient or material so as to render the article injurious to health."

That section was construed in *Hull v. Horsnell*, 68 J. P. 591, which involved preserved peas, the color of which had been retained by the addition of sulphate of copper, charged to be a poisonous substance and injurious to health. There was a conviction in the lower court. Lord Alverstone, C. J., in reversing and remitting the case on appeal, said:

"In my opinion, if the justices convicted the appellant of an offence under s. 3 of the Sale of Food and Drugs Act, 1875, on the ground that the ingredient mixed with the article of food was injurious to health,—that the sulphate of copper was injurious to health, and

not on the ground that the peas by reason of the addition of sulphate of copper were rendered injurious to health, the conviction is clearly wrong. To constitute an offence under the latter part of s. 3 the article of food sold must, by the addition of an ingredient, be rendered injurious to health. All the circumstances must be examined to see whether the article of food has been rendered injurious to health."

We reach the conclusion that the Circuit Court of Appeals did not err in reversing the judgment of the District Court for error in its charge with reference to subdivision five of section 7.

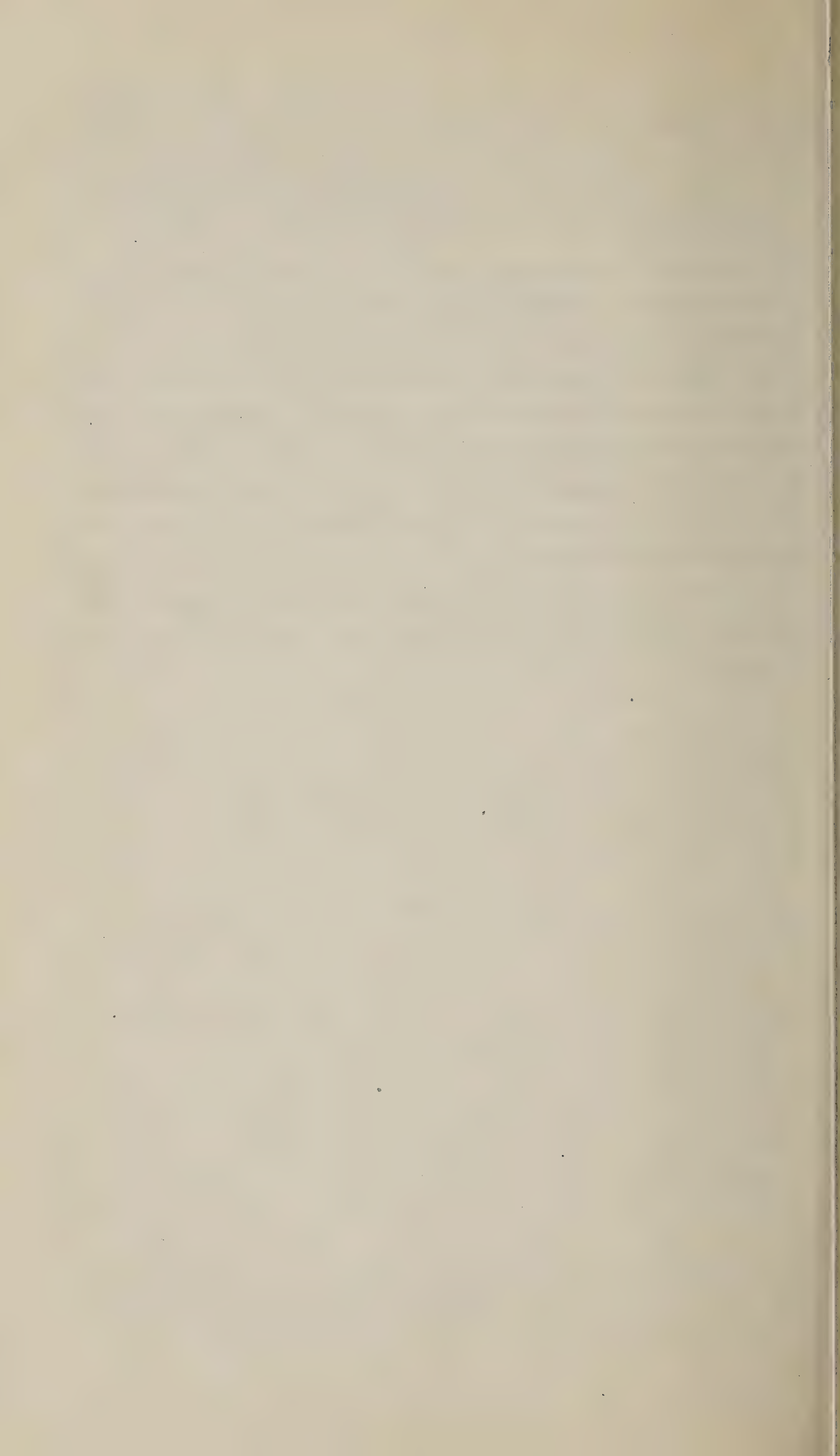
The Circuit Court of Appeals reached the conclusion that there was no substantial proof to warrant the conviction, under the fourth subdivision of section 7, that the flour was mixed, colored and stained in a manner whereby damage and inferiority was concealed. As the case is to be retried to a jury, we say nothing more upon this point.

As to the objection on constitutional grounds, it is not contended that the statute as construed by the Circuit Court of Appeals and this court is unconstitutional.

It follows that the judgment of the Circuit Court of Appeals reversing the judgment of the District Court must be affirmed, and the case remanded to the District Court for a new trial.

Affirmed.





United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 80.

FRANCIS G. CAFFEY, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the United States Circuit Court of Appeals for the Sixth Circuit affirming the judgment of the District Court of the United States for the Eastern District of Tennessee dismissing the libel for the condemnation and forfeiture of 40 barrels, etc., of Coca Cola seized under section 10 of the Food and Drugs Act of June 30, 1906 (34 Stat., 768).

No. 2415.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

UNITED STATES OF AMERICA, PLAINTIFF
in error,

v.

FORTY BARRELS AND TWENTY KEGS
of Coca Cola, defendant in error.

Error from the District Court
of the United States for the
Eastern District of Tennessee.

Submitted November 10, 1913.

Decided June 13, 1914.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This proceeding was brought by the United States to condemn a quantity of syrup called Coca Cola. Forfeiture was claimed under the Pure Food Law (34 U. S. S. L. 768), because the syrup was said to be adulterated and misbranded. The case was tried at great length before a jury; at the conclusion of the trial, the government withdrew certain issues, and upon the two remaining matters, the court instructed a verdict for the Coca Cola Company, the claimant of the property. The sole question presented by this writ of error is whether there was any evidence tending to show that the article was either adulterated or misbranded within the prohibition of the act. The facts presented and the questions involved are so well set out by the District Judge in his carefully

prepared opinion (191 Fed. Rep., 431)¹ that we refrain from further preliminary statement. The sections and clauses of the act which it seems may have some bearing on the question before us are given in the margin.²

In applying a statute to particular facts and where it becomes necessary to construe language to which opposing sides give different meanings, it is vital to have in mind the essential scope and purpose of the act. The present case well illustrates the importance of this consideration. Much of the government's contention as to the extent of the prohibitions here found rests upon the theory that Congress intended to protect the public health by preventing (to the extent of the constitutional power resting in the commerce clause) the sale or transportation of deleterious foods. The opposing contention denies this broad purpose and concedes only the intent to prevent any fraud or deception in the sale of foods. The title to the act is broad enough to support the government's utmost claim as to general purpose. It is, "An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, etc." If there was nothing in the body of the act expressly prohibiting the sale of deleterious food, *qua* deleterious, this title would furnish some reason for expanding in that direction any terms of prohibition there might be, ambiguous enough to permit the implication (*Goodlett v. L. & N. R. R.*, 122 U. S., 391, 408); but we find in Sec. 11, which relates solely to importations from foreign countries, an express direction that such importation shall be wholly

¹ The parts of the libel voluntarily dismissed by the government were those matters numbered 4 and 5 in the District Judge's opinion; the statement on page 440 of 191 Fed. Rep. is erroneous in this respect.

² Sec. 6 * * * the term "food," as used herein, shall include all articles used for food, drink, confectionery or condiments, by man or other animals, whether simple, mixed or compound.

Sec. 7. That, for the purposes of this act, an article shall be deemed to be adulterated * * * in the case of food * * * third, if any valuable constituent of the article has been wholly or in part abstracted * * * fifth, if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.

Sec. 8. That the term "misbranded" as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article or ingredients or substance contained therein which shall be false or misleading in any particular * * * that for the purposes of this act, an article shall also be deemed to be misbranded * * * in the case of food: First, if it be in imitation of or offered for sale under the distinctive name of another article. Second, if it be labelled or branded so as to deceive or mislead the purchaser * * * or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, heroin, alpha or beta eucane, chloroform, cannabis indica, chloral hydrate or acetanilid or any derivative or proportion of any such substances contained therein * * * Fourth, if the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substance contained therein, which statement, design or device shall be false or misleading in any particular; *provided* that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First, in the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand, with a statement of the place where said article has been manufactured or produced. Second, * * * and *provided further* that nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient, to disclose their formulas, excepting so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

forbidden if the food is adulterated or misbranded "or is otherwise dangerous to the health of the people of the United States." We have, therefore, a provision which responds to the call of the title in this particular and makes it unnecessary to resort to any otherwise unjustifiable construction for the mere purpose of giving some effect to all parts of the title. With the exception of this clause of Sec. 11, every other directly or indirectly prohibitory clause of the act relates to articles which carry the taint of deception and fraud by being adulterated or misbranded. Section 2 prohibits interstate commerce in any article "which is adulterated or misbranded within the meaning of this act" and subsequent clauses of the same section refer to "any such article so adulterated or misbranded within the meaning of this act" and to "any such adulterated or misbranded foods." The expert examination provided for by Sec. 4 is to determine "whether such articles are adulterated or misbranded." Section 7 defines when, for the purposes of the act, an article shall be deemed to be adulterated, and Sec. 8 defines the term "misbranded" as used in the act, and specifies when, for the purposes of the act, an article shall be deemed to be misbranded. Section 9 prescribes a certain immunity from prosecution when there is a guaranty to the effect that the article is not adulterated or misbranded within the meaning of the act. Section 10 provides for the seizure and forfeiture of the offending articles, but its effect is limited to an article which is adulterated or misbranded within the meaning of the act. A subsequent clause of Sec. 10 furnishes some superficial support for the broader theory of the purpose of the act by providing for the disposition of the offending article, if it "is condemned as being adulterated or misbranded or of a poisonous or deleterious character within the meaning of this act"; but this support is only superficial, because the power to condemn, given by the first part of Sec. 10, rests on the finding that the article is "adulterated or misbranded." This general reference to a poisonous or deleterious character as ground of condemnation must be to instances where that character, by incorporation into the article, causes the fatal adulteration or misbranding. Considering all these parts of the act, together with its title, we can not doubt that, so far as its general purpose and intent furnish any aid for interpretation, that general purpose and intent must be deemed to be the prevention of fraud and deception, so that the purchaser can get the thing he has a right to suppose he is getting, rather than the protection of the public health to the extent of preventing the purchaser from deliberately and intentionally buying a particular food which is what it purports to be, even though a jury might think it "deleterious." If argument were needed to sustain this conclusion, it could be found in the provisions as to drugs. Foods and drugs are put on the same basis throughout, save

as to matters of definition, and some detailed requirements. There can be no room to suppose that the act was intended to prohibit broadly the sale of all deleterious foods and not to prohibit with equal breadth the sale of all poisonous drugs. The latter supposition is impossible; and so the former can not be accepted. Further support will be found in the provisions which, by necessary implication, permit the sale of foods containing cocaine, morphine, and the like, provided the purchaser is properly advised of the contents. These views of the general purpose of the act have been accepted by the decisions, so far as they go (*Savage v. Jones*, 225 U. S., 501, 533-5; *McDermott v. Wisconsin*, 228 U. S., 115, 131; *United States v. Lexington Co.*, 232, U. S. 399, 409).

The general language of the court in the last cited case that "the statute was intended to protect the public health from possible injury," is not at all inconsistent with the view we have expressed, because that language is used with reference to adulterations and the addition to known foods of injurious elements. The very word "adulterated" imports fraud and deception; it implies that the article is not what it purports to be.

Under the statement of facts, it is clear that the only question arising under Sec. 7 is whether the caffeine in the Coca Cola is an "added poisonous or other added deleterious ingredient which may render such article injurious to health"; and, under the assumption made by the District Judge, of which the government can not complain, and which we here adopt, but only for the purposes of this opinion—i. e., that there was evidence requiring submission to the jury to the effect that caffeine is a poisonous or deleterious ingredient which may render the Coca Cola injurious to health—it is equally clear that the turning point is whether it can be said or whether a jury could be permitted to say that the caffeine was "added" within the meaning of this clause.

It is impossible intelligently to conceive the meaning of "added," unless we suppose a base upon which the addition is placed, and we at once meet the question: If caffeine is the addition, what is the base? For fifteen years before the passage of the act, Coca Cola had been an existing article of food (within the statutory definition of "food") and in the latter ten years of that period, it had been one of the most widely known and used articles of its general class. It was a compound; it had no distinctive base (unless water, by reason of its larger proportion); it was made up of water, sugar, caffeine, phosphoric acid, glycerine, lime juice, coloring matter, flavoring matter and "mechandise No. 5." Each of these elements is more or less important; there seems to be no method of determining their relative importance; but if any one may be rejected as comparatively negligible or secondary or non-characteristic, that one is not caffeine.

In the manufacturing process, water and sugar are boiled to make a syrup; this boiling is repeated; then caffeine is "added" and then the syrup is boiled once or twice more; the syrup is then put into a cooling tank and then into a mixing tank in which the remainder of the process is carried on and in which the other elements become part of the ultimate combination. It is plain as may be that without caffeine, the mixture would not be Coca Cola, and the purchaser who had been using it in its standard form fifteen years when the act was passed, and who might then buy an article of the same name which did not contain any caffeine, would rightfully think that he was deceived; and yet it is said that the act intended to prevent misleading the public is violated unless the public is thus misled.

It is another form of the same thought to say that the mere use of the word "adulterate" or "added" implies the existence of a standard; and it is a contradiction in terms to say that the use of an element necessary to constitute the standard is an adulteration of, or addition to, the standard; but to this contradiction, the argument for the government necessarily leads. So, further, we find that clause 3 of that division of Sec. 7 relating to foods declares adulteration if any valuable constituent has been abstracted. Caffeine is a valuable constituent. If it is omitted, the article is adulterated, and if it is included, the article is adulterated. We must break clause 3, to keep clause 5.

It is urged that in case of a compound article each element is, in a proper sense, "added," and so, if any element is deleterious, it is an "added deleterious ingredient." This position not only depends in part upon what we have thought an erroneous view of the general purpose of the statute, but it destroys all force in the word "added" and gives clause 5 of that part of Sec. 7 relating to food precisely the same meaning as if it read "if it contain any poisonous or other deleterious ingredient, etc." The deliberate and careful insertion of the word "added" before the word "poisonous" and again before the word "deleterious," while the word is omitted in the preceding almost identical clause relating to confectionery, can not be treated as accidental or meaningless. So to do, would violate the settled rule of construction which requires us to "give full effect to all the words in their ordinary sense" (*Bend v. Hoyt*, 13 Pet. 263), and requires that "signification and effect shall, if possible, be carried to every word" (*Washington Co. v. Hoffman*, 101 U. S. 112, 115), and declares it the "duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed" (*Montclair v. Ramsdell*, 107 U. S. 147, 152).

Again, it is urged that the true test whether the deleterious ingredient is "added" is whether this ingredient is in its natural or in an

artificial form. This criterion is supposed to find support in statements made during the Congressional debates and in the well-known fact that many natural articles of food, like fruits, contain elements which in the combination formed by the complete fruit are not materially harmful, but which, when extracted and administered separately, may be injurious. This criterion may often be a useful aid in applying and interpreting the statute, but to apply it as a hard and fast rule where artificially compounded foods are under consideration comes to saying, in the case before us, that if coffee berries or tea leaves, or, we take it, the complete extract of coffee berries or tea leaves, containing the amount of caffeine now in question, were put into the compound in its manufacture, there would be no violation of the law, but that if the caffeine, and that only, which was in these same coffee berries or tea leaves or in some other natural product is put into the syrup, the law is broken. Alcohol surely might be considered a "deleterious ingredient," if caffeine may be; but can we suppose that a compound food would be obnoxious to this law if it contained five per cent. of alcohol purchased in the market ready distilled and yet that a compound otherwise the same would be within the approval of the law though it contained twenty-five per cent. of alcohol distilled from grain during the process of making the compound? There has been much controversy whether "blended whiskey" could be sold under that name, but it has never been thought to be forbidden merely because its alcohol was an "added" ingredient. Many wines are "fortified" by adding alcohol, and these may be obnoxious to the law for other reasons; but if the theory now under consideration is correct, they could not be sold at all, no matter how labelled. This theory must even lead us to say that if a ground or pulverized coffee or a coffee extract is so deficient in caffeine as to be below standard, the law is violated by adding from another source caffeine enough to make the coffee of full normal strength, or to say that it is a vital distinction whether the citric acid contained in any familiar and popular acid beverage is at the time of compounding squeezed from a lemon or poured from a bottle. We can not follow the argument which brings us to those results. Not only is it without basis in the statute, but it lacks inherent cogency.

We get from Sec. 8 some help on the proper meaning of the phrase "added poisonous or deleterious ingredient," because, unquestionably, the two sections must be construed together and the same phrase should have the same construction in each. The proviso of the fourth paragraph of that part of Sec. 8 relating to food seems to be drawn with express reference to situations like the present. Congress must have known that many proprietary articles of food and drugs were upon the market under proprietary or trade names, and Congress thought fit to provide that these things should not be deemed

to be adulterated unless any deleterious ingredient contained therein was "added." This recognizes somewhat more expressly than is done by Sec. 7 the thought that the necessity of a standard before there can be any adulteration applies as well to compounds as to simple foods, and then avoids future difficulties in application by providing that the compound article, in its distinctive and known form, should be the standard.

We do not overlook the argument that the act makes no distinction between compounds known at its date and those thereafter devised, and so that the construction which prevents an inherent element from being considered as "added" leaves the manufacturer at liberty to use any poison he pleases in making up his compound "food," provided only he gives to it and sells it under a distinctive name. This conclusion must, to some extent, be granted; yet it loses most of its apparent force when we remember the real purpose of the act and observe the express direction of the law that the maker of a proprietary food need not disclose its contents if he states the place of manufacture. It would seem a proper provision that if a proprietary food contains any ingredient fairly subject to be called deleterious, the maker should disclose on the label its presence and its extent, just as is required in numerous specific instances; but we can not make such a law. On the other hand, it is difficult to suppose that Congress intended absolutely to forbid the use in any compound of any element that a jury might later call "deleterious;" but it must be one thing or the other. The prohibition is either absolute or nonexistent. The best known habit-forming drugs are selected, and implied permission is given to allow their use in compounding products for sale, provided they are named on the label; but as to the great mass of other food and drug elements which are undoubtedly deleterious if used to excess, there is no provision for naming them on the label. If they are within the definition of "added deleterious ingredient," they may never be used under any conditions or in any quantity that may be injurious to health, even though they are described in the largest of letters on the outside of the package. This way of reading the statute would practically greatly impede the progress of synthetic chemistry in foods, and we think it distinctly more unreasonable than it is to suppose that Congress, having selected and regulated the use of those things known to be particularly dangerous, thought best not wholly to forbid at that time other things from which no serious danger need be anticipated.

There is a middle view which is sufficient for the purposes of this case and which will recognize the composite meaning of "added deleterious" rather than the separate meaning of each word. This view is that in using the word "added" with reference to a possibly deleterious food ingredient, Congress had in mind an addition above and

beyond the quantity in which such ingredient was normally found in usual and customary articles of food, and that no such ingredient should be considered as "added" if it was present only in the quantity in which it existed in these common articles of food with which every member of Congress was familiar, and which had generally been thought wholesome. For example: creosote and other products of destructive wood distillation are, independently considered, injurious, but they have always been present in smoked hams. Can the addition of the same preservatives to the same extent to the same meat be something that Congress intended to prohibit? The boric acid, found in apples, is a preservative. If certain apples which are to be preserved are not up to the maximum in this element, did Congress intend to forbid supplying the deficiency by the same element from another source? Acetic acid may, of course, be injurious, but if, by its use, an artificial vinegar is made which is chemically and in every way equivalent to the natural vinegar familiar to the members of Congress in many compounds, would they have thought of it as a deleterious addition? No example is so clear as the very one here involved. Every member of Congress had been familiar, from childhood, with tea and coffee; perhaps most of them drank it. The average cup of coffee contains more than two grains of caffeine; the average cup of tea, one and one-half grains. A glass of Coca Cola, as consumed, contains one and one-fifth grains of caffeine. The chemical qualities and the physiological effects of the caffeine which is in the tea or coffee and of the caffeine which is in the Coca Cola are precisely the same. We are quite convinced that the use in an artificial beverage of a certain element which had been one of its characteristic elements for many years, and when such use was in a less proportion than the same element was known to make up in different natural beverages then in universal use and generally thought wholesome—that such an element so employed could not have been within the meaning of Congress when it chose the words "added deleterious ingredient."

The question arising under Sec. 8—the misbranding section—is to be determined by the proviso under the fourth clause relating to food. Separate reference to the first clause which forbids sale "under the distinctive name of another article" is unnecessary, because the same prohibition is repeated in the proviso under clause four. We have reached the conclusion that Coca Cola does not contain any "added poisonous or deleterious ingredients," and it is undisputed that the labels carry a statement of the place of manufacture. Hence, this proviso declares that Coca Cola shall not be deemed to be adulterated or misbranded if it was or is known as an article of food under its own distinctive name and if it is not in imitation of or offered for sale under the distinctive name of another article. It is an article of food, under

the definition of the statute. That it was, at the time of the passage of the law and ever since has been, known under its own distinctive name is too clear for question, except as it is said that the adopted name can not be its distinctive name because it is the distinctive name of another article. Neither is it said to be an imitation of another article, except as these words also raise the same question whether it is sold under the distinctive name of another article. Coming to that question, and just as on the subject of adulteration we must first find the standard, we here first meet the inquiry: What is the "distinctive name of another article" under which name Coca Cola is sold? The record makes it very clear to us that there is no such other article. No article, except plaintiff's compound is or ever has been sold "under the distinctive name," Coca Cola. These words constitute and are the distinctive name of plaintiff's product, and they are the distinctive name of nothing else. "Coca" is indicative of one article; "cola" is indicative of another, very distinct, but "Coca Cola" was not, in 1892, and (save for the general knowledge of plaintiff's article) is not now intelligently descriptive of any combination of the two. It might be medicine, food or drink; it might be to swallow, smoke or chew. These associated words as the distinctive name of any substance or combination of substances were unknown until adopted by plaintiff; that "distinctive name" is still unknown as an appellation for any other substance on the market.

The burden put upon the government to show that Coca Cola is masquerading under the distinctive name of another article is surely more exacting than the burden on one attacking the trade-mark to show that the name is sufficiently misleading as indicating the makeup of the product so that it is an improper trade-mark. We consider the latter question in our opinion this day filed in *Nashville Syrup Co. v. Coca Cola Co.*, and conclude that the name carried no forbidden deception. We need not here repeat that discussion. If that conclusion is correct, it is even more certain that Coca Cola is not guilty of posing "under the distinctive name of another article."

It follows that the judgment below must be affirmed.





United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 81.

FRANCIS G. CAFFEY, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the United States Circuit Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York in a prosecution for violation of the Food and Drugs Act, June 30, 1906 (34 Stat., 768).

SYLLABUS.¹

1. The fourth amendment to the Constitution of the United States, which provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation," held not to require an information filed by a United States attorney alleging violation of the Federal Food and Drugs Act to be supported by the oath or affirmation of any person having knowledge of facts showing probable cause for the prosecution, where the defendant voluntarily appeared and answered the allegations of the information, and no warrant of arrest was issued on said information.

2. Evidence held sufficient to warrant the trial court in submitting to the jury the question of fact as to whether an article labeled: "Creamthick * * *. It is guaranteed to contain no gelatine, gum arabic, egg albumen, or similar article," was misbranded because it contained Indian gum, which was alleged to be a "similar article" to gum arabic.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

OSCAR J. WEEKS, DOING BUSINESS UNDER the name of Oscar J. Weeks & Co., plaintiff in error (defendant below), v. THE UNITED STATES OF AMERICA, DE- fendant in error (plaintiff below).	}	In error to the United States District Court for the Southern Dis- trict of New York.
--	---	--

[June —, 1914.]

Before COXF, WARD, and ROGERS, *Circuit Judges*.

ROGERS, *Circuit Judge*: The defendant has been convicted of a crime committed in violation of the Pure Food and Drugs Act, approved June 30, 1906. The information charged the defendant with

¹Not by the court.

having shipped from New York City to St. Louis, Mo., a certain article of food, labeled in part as follows:

“Cream thick—Serial No. 2049—Manufactured by O. J. Weeks & Co., New York, New York. It is guaranteed to contain no gelatine, gum arabic, egg albumen or similar article.”

This label, it was charged, was false and misleading and calculated to mislead and deceive purchasers in that the article of food contained as one of its ingredients an article similar to gum arabic, to wit, Indian gum. The information was signed by the United States attorney, but was not verified, nor were any affidavits filed or submitted to the court. The defendant appeared and demurred to the information, and in specification of points under his demurrer alleged “that the said information is not supported by a verification or oath showing personal knowledge or probable cause.” His demurrer was overruled, and being required to plead he pleaded not guilty. At the close of the trial his counsel renewed his motion that the information be dismissed for reasons before stated, but his motion was denied and the case was submitted to the jury and a verdict of guilty was rendered.

The question we have to decide, therefore, is whether an attorney for the United States can proceed in the courts of the United States by information to prosecute one who is alleged to have committed a misdemeanor, where the information is not verified or supported by an affidavit showing personal knowledge or probable cause.

There can be no conviction or punishment for a crime without a formal and sufficient accusation. A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged with the commission of the particular offense and charged in the particular form and mode required by law. If that is wanting his trial and conviction is a nullity, for no person can be deprived of either life, liberty, or property without due process of law. The forms or modes of accusation which the law recognizes are: Indictment or presentment by a grand jury, and information by the public prosecutor.

The colonists who came to this country from England brought with them the common and statute laws of England as they existed at the time of their emigration and in so far as they were applicable to the local circumstances of the colonies which they established. Among the principles of the common law which they brought were those which regulated the mode of proceeding in criminal cases—the law relating to indictments and informations and the right to trial by jury—although in the colonies as well as in England various statutes had abolished, prior to the Declaration of Independence, a number of the oppressive provisions of English law relating to criminal trials. Among the principles which had thus been abrogated,

for example, was that which denied to a person accused of a capital crime the right to have compulsory process for his witnesses and that which withheld from him the right to examine on oath those witnesses who voluntarily appeared for him, as well as that which forbade him the aid of counsel in his defense, except only as regarded questions of law. (See *The United States v. Reid*, 12 How., 360, 363 (1851).)

The proceeding by information is said to have been unpopular in England and to some extent in the colonies. But it has never been abolished in England, although in some of our States it has been abolished. At the time of the Declaration of Independence it was a familiar mode of criminal procedure in all the colonies.

When the statute of 3 Henry VII extended the jurisdiction of the court of star chamber and informations became restricted in practice to that court, the members of which were the sole judges of the law, the fact and the penalty, Blackstone (4 Commentaries, 310) states that a very oppressive use was made of them for something more than a century, "so as continually to harass the subject and shamefully enrich the Crown." And when the court of star chamber was abolished in the time of Charles I and proceedings by information were again used in the court of King's bench, the prejudice which had arisen from the long abuse of this process was so strong that it was strenuously contended that all proceedings by information were illegal as being contrary to the nature of English laws and to Magna Charta. But the objections were overruled, Sir Matthew Hale saying:

That although in all criminal cases the most regular and safe way, and most consonant to the statute of Magna Charta, is by presentation or indictment of 12 sworn men, yet, for crimes inferior to capital ones, proceedings might be by information, and this from long and frequent practice was certainly established as the law of the land. (5 Mod., 463; Show., 106; Bacon's Ab. Information, A; 2 Hawk., P. C. 260; 4 Black. Com., 130; 1 Ersk. Speeches, 275; *State v. Dover*, 9 N. H., 468 (1838).)

And the unpopularity of informations was not restricted to the mother country, but, as we have already said, existed to some extent in this country. Mr. Justice Wilson, of the Supreme Court of the United States, and who was also a member of the Constitutional Convention of 1787, in the lectures which he delivered as professor of law in the University of Pennsylvania in 1790-1792, after calling attention to the two kinds of informations—those filed ex officio by the public prosecutor and those carried on in the name of the Commonwealth or Crown, but in fact at the instance of some private person or common informer—said:

The first have been the source of much, the second have been the source of intolerable, vexation; both were the ready tools by using, Empson and Dudley, and an arbitrary star chamber which fashioned the proceedings of the law into a thousand tyrannical forms. Neither, indeed, extended to capital crimes; but ingenious tyranny can torture in a thousand shapes without depriving the person tortured of his life.

After calling attention to the fact that in England restraints had been imposed upon informations at the instance of private persons but not upon those filed *ex officio* by the public prosecutor, he went on to say:

By the constitution of Pennsylvania, both kinds are effectually removed. By that constitution, however, informations are still suffered to live; but they are bound and gagged. They are confined to official misdemeanors; and even against those they can not be slipt but by leave of the court. By that constitution, "no person shall for any indictable offense, be proceeded against criminally by information"—"unless by leave of the court, for oppression and misdemeanor in office." (2 Wilson's Works, Andrews ed., p. 459.)

There seems to be no doubt that prosecution by information is as ancient as the common law itself. The subject had no reason to complain because this method of prosecution was adopted, for as Blackstone (4 Commentaries, p. 310) states:

The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had been by indictment.

Moreover, it seems to have always been the rule that the substantial parts of the information had to be drawn with as much exactitude as the corresponding parts of an indictment for the same offense.

In the early days of the Federal Government informations were principally used, if not exclusively used, for the recovery of fines and forfeitures. And Mr. Justice Story, in his Commentaries on the Constitution, section 1780, and written in 1833, said, in speaking of informations:

This process is rarely recurred to in America; and it has never yet been formally put into operation by any positive authority of Congress under the National Government, in mere cases of misdemeanors; though common enough in civil prosecutions for penalties and forfeitures.

But within the last 50 years prosecutions by informations have increased greatly in the Federal courts. (See *ex parte Wilson*, 114 U. S., 417, 425.)

It appears, as Stephens states in his History of the Criminal Law, volume 1, page 295, that from the earliest times the law officers of the King accused persons of offenses not capital in his own court without the intervention of a grand jury. But the right to prefer a criminal information is at common law restricted to misdemeanors. "At common law an information will lie for any misdemeanor, but not for a felony." (22 Cyc., 187, and cases there cited.)

The offense charged in the information now under consideration was plainly a misdemeanor, and for more than 200 years the right has been established in England to prosecute by information and without the sanction of a grand jury a person charged with having committed a misdemeanor.

Bacon in his Abridgment, volume 3, page 635, after stating that an information differs principally from an indictment in that "an indictment is an accusation founded by the oath of 12 men, whereas an information is only the allegation of the officer who exhibits it," goes on to explain that there were two kinds of criminal informations in use in England under the common law procedure. The first, which was for offenses more immediately against the King, was filed, he says, by the attorney general, ex officio, and without leave of court. The second, which was for offenses against private individuals, was exhibited by masters of the Crown, and, as matter of course, prior to the statute of 4 and 5 William and Mary, c. 18. But after that statute was enacted informations of the second class, he declares, could not be filed except upon leave of court, and all such informations had to be supported by the affidavit of the person at whose suit it was filed.

In the United States it has been suggested that informations brought by the prosecuting officers answer to the informations filed by the masters of the Crown, and which, as said, had to be supported by affidavit, and not to the informations of the first class, or those which related more immediately to the King and which could be filed without affidavit. Those who make this suggestion rely upon the statement found in Blackstone's Commentaries, volume 4, page 309, where that distinguished commentator says:

The objects of the King's own prosecutions, filed ex officio by his own attorney general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his Government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal; which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations filed by the master of the Crown office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the Government (for those are left to the care of the attorney general), but which, on account of their magnitude or pernicious example, deserve the most public animadversion.

Now this statement may seem to imply that the attorney general's right to file informations for misdemeanors was not unlimited, but was restricted to misdemeanors which tended to disturb or endanger the Government. But if this was his meaning it is evident that he was mistaken in his understanding of the law. Chitty in his great work on the Criminal Law, page 384, says:

Informations may be filed by the attorney general for any offense below the dignity of felony, which tends, in his opinion, to disturb the Government or immediately interfere with the interests of the public or the safety of the Crown. He most frequently

exercises this power in cases of libels on Government or high officers of the Crown, etc. He seems, indeed, at his option to exact it when any offense occurs which may thus be prosecuted in the Crown office. He may file an information against anyone whom he thinks proper to select, without oath, without motion or opportunity for the defendant to show cause against the proceeding.

And Cole, in his work on Criminal Informations, page 9, says that—

The attorney general may exhibit an ex officio information for any misdemeanor whatever.

And Hawkins, in his Pleas of the Crown, volume 2, page 369, says:

As to the first of these particulars, viz: In what cases such informations lie, it hath been holden, that the King shall put no one to answer for a wrong done principally to another, without an indictment or presentment, but that he may do it for a wrong done principally to himself. But I do not find this distinction confirmed by experience; for it is everyday's practice, agreeable to numberless precedents, to proceed by way of information, either in the name of the attorney general or of the master of the Crown office, for offenses of the former kind, as for batteries, cheats, seducing a young man or woman from their parents in order to marry them against their consent, or for any other wicked purpose; spiriting away a child to the plantations, rescuing persons from legal arrests, perjuries and subornations thereof, forgeries, conspiracies, whether to accuse an innocent person or to impoverish a certain set of lawful traders * * * and other such like crimes done principally to a private person, as well as for offenses done principally to the King.

In Clark on Criminal Procedure, pages 128 and 129, it is said:

By an early English statute (4 and 5 William and Mary, c. 18), however, which is old enough to have become a part of our common law, if applicable to our conditions, it was provided that informations by masters of the Crown office could only be filed by leave of court and that they should be supported by the affidavit of the person at whose suit they were preferred. The law remained that informations filed by the attorney general (and as already stated he could file them for any misdemeanor) need not be so supported, and that he was the sole judge of the necessity or propriety of filing them. There is some authority for the proposition that the kind of information now in this country is that which in England was filed by the attorney general. * But by the better opinion, the other kind of information is now in this country.

In Bishop's Criminal Law, page 110, it is said:

In our States the criminal information is now presented by the attorney or solicitor general only, as in England is presented by the attorney or solicitor general. The English common law has plainly become common law with us. As with us the powers which in England were exercised by the attorney or solicitor general are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, under our common law to prosecute by information, as a right adhering to their office and without leave of court.

If it is true, and it seems to be, that the district attorneys exercise the powers which in England were exercised by the attorney or solicitor general, then they are entitled to proceed upon information and that without leave of the court and without affidavit.

It is necessary to keep in mind what Mr. Stephen in his General View of the Criminal Law of England, page 156, calls the "most

characteristic principle of the law of England" on the subject of criminal procedure, namely, that in that country "everyone, without exception, has the right to use the Queen's (King's) name for the purpose of prosecuting any person for any crime." The (statute 4 and 5 William and Mary, c. 18) was intended to restrict the right of prosecution by private and not public prosecutors. Prior to that act it had been within the power of any individual to file an information without disclosing to the court the grounds upon which it was exhibited. (4 T. R. 290.) And the meaning of the statute was that the clerk of the Crown should thereafter file no information of a private prosecutor without leave of the court, and that the fact that there was probable cause for filing it should be disclosed in order that the court might know whether to grant leave and it was further intended to preclude the issuance of process on such informations without recognition. (Comyn's Digest, vol. 4, p. 558, note.) But there was no intention to limit the right of the attorney general to prosecute by information as he always has done. It was not necessary in England either before or after the statute that he should obtain leave of the court before filing his information and there was, therefore, not the same reason why he should verify any information which he filed. Moreover, he was acting throughout under his oath of office and it was not assumed that he would proceed upon information without probable cause.

We think that the weight of authority is that in this country, as the text writers assert, the informations used by the prosecuting officers are the informations used by the attorney general in England and not those exhibited by masters of the Crown and which were governed by 4 and 5 William and Mary, c. 18. And as at common law an information could be filed by the attorney general simply on his oath of office and without verification, it has been held in this country that verification of an information by a prosecuting attorney is unnecessary unless required by some constitutional or statutory provision. (*Long v. People*, 135 Ill., 435; *People v. Grancy*, 91 Mich., 646; *State v. Pohl*, 170 Mo., 422, 22 Cyc., 281.)

We pass, therefore, to inquire whether there is anything in the Constitution of the United States or in the acts of Congress which in any way alters the common law respecting the right of the prosecuting officers of the Government of the United States to proceed by information in criminal cases in the Federal courts.

The Constitution of the United States leaves all offenses against the United States open to prosecution by information except those which are capital or infamous. The restriction as to those offenses is contained in the fifth amendment:

No persons shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger

The Supreme Court in *ex parte Wilson* (144 U. S., 417, 1885) authoritatively decided what meaning is to be attached to the word "infamous" in this connection. The court held that a crime punishable by imprisonment for a term of years with hard labor is an infamous crime. In the constitutional sense it is not the character of the crime, but the nature of the punishment which renders the crime infamous. The offense with which the defendant in this case is charged is not an infamous one, but one upon which he might be tried upon information.

The acts of Congress not only have not prohibited the use of informations, but have on the contrary expressly authorized their use in certain cases. (See sec. 1022 of the Revised Statutes.)

The fourth amendment to the Constitution of the United States provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Mr. Justice Story, in his *Commentaries on the Constitution*, volume 2, section 1902, in speaking of this amendment, states that:

It is little more than the affirmance of a great constitutional doctrine of the common law.

If that be true and if it also be true that at common law the Attorney General could file an information without verification or affidavit of probable cause, his oath of office being regarded as sufficient, then this particular amendment should not be regarded as altering the rule upon that subject. In *United States v. Maxwell* (3 Dillon, 275, 1875), in an opinion written by Judge Dillon, it is said:

We are of the opinion, therefore, that offenses not capital or infamous, may, in the discretion of the court be prosecuted by information. We can not recognize the right of the district attorney to proceed on his own motion and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury.

The facts in the case were that prior to the term complaint on oath had been made before a United States commissioner charging the defendant with several violations of the internal-revenue laws, and the defendant was arrested upon a warrant issued by the commissioner and held to answer to the district court. At the term, the district attorney, upon the said complaint, warrant, and recognizance, moved the court for leave to file criminal information against the defendant, charging him with said offenses, which leave was granted and the information accordingly filed. The defendant appeared and pleaded guilty. Afterwards his counsel made a motion in arrest of judg-

ment upon the ground that the defendant could only be punished criminally upon an indictment and not upon an information. The motion in arrest of judgment was overruled, the court using, in the course of its opinion, the language already quoted. The case can not be regarded as holding that an information must be verified. The court, in a dictum, announced that it would not permit an information to be filed, and a warrant of arrest to issue without some evidence being presented under oath that probable cause of guilt existed.

In *United States v. Smith* (40 Fed., 755, 1889), in a case which arose in the Circuit Court for the Eastern District of Virginia, Judge Hughes said:

A preliminary question raised in the argument was whether the district attorney may, of right, by virtue of his official prerogative, file informations charging citizens with offenses brought officially to his knowledge. This can not be done, under the rules and practice of this court, except upon previous complaint under oath, after opportunity has been given the accused to appear before the examining officer, and to confront the witnesses testifying in support of the complaint. This requisite makes it necessary that the district attorney shall have leave from the court to file an information; and, if it is within the discretion of the court to grant the leave or not, then the right to file is not a prerogative of the prosecutor's office, and the court may require him before granting leave to bring the accused, by rule or other proceeding, before the court, to show cause, if cause there be, against the filing of the information.

The decision does not hold that an information must be verified.

The case most frequently cited in the Federal courts on this subject is that of *United States v. Tureaud* (20 Fed., 621), decided in 1884 in the fifth circuit by Judge Billings, of the eastern district of Louisiana. It was decided in that case that informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them. And the court quashed an information which was based on an affidavit which read:

George A. Dice, being duly sworn, says: All the statements and averments in the foregoing information are true, as he verily believes.

It was conceded—

that under the usages of the Government of Great Britain this information belongs to the class of formal accusations which could be made by the King in his courts without any evidence and against all evidence.

The opinion then continued:

But the adoption of the fourth amendment affected all kinds and modes of prosecution for crimes or offenses, for there can be no legal pursuit of accused persons without apprehension. All prosecutions require warrants. An information, a suggestion of a criminal charge to a court, is a vain thing unless it is followed by a *capias*. The procedure by information, therefore, after it was acted upon by this amendment lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation—not by Kings—because we have in the department of criminal law no successor to him, so far as he represented a right to institute,

if it pleased him, unsupported incriminations, nor by the district attorney, nor any other officer of the United States, for the Constitution has said, in effect, that in no way nor manner shall magistrates or courts issue warrants, except upon proofs, which are to be upon oath and make probable excuse.

What is said as to the necessity for a verification of the information we think is correct in any case where the application for the issuance of a warrant of arrest is based on the information. In the United States *v. Polite* (35 Fed., 58 (1888)) in the district court for the district of South Carolina, it is said that—

informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them and that mere belief is not sufficient.

In this case the information was not sworn to, but accompanying it were the papers of the commissioner who held the preliminary examination, including the sworn testimony of the witnesses taken in the presence of the accused. It was held that this was sufficient and a motion to quash was refused.

In *Johnston v. United States* (87 Fed., 187 (1898)) in the Circuit Court of Appeals for the Fifth Circuit the two preceding cases are referred to and approved. The information was not sworn to but was accompanied by an affidavit. The court said:

The affidavit on which the information was based was wholly insufficient *to warrant the arrest and trial* of the plaintiff in error and is altogether too general in terms as to the offense against the United States said to have been committed; and it shows no knowledge, information, nor even belief on the part of the affiant as to the guilt of the party charged, beyond the bare statement that “there is probable cause to believe that the said offense has been committed by P. T. Johnston.” However false the affidavit may be it would be next to impossible to assign and prove perjury upon it.

In the United States *v. Baumert* (179 Fed., 735, 742 (1910)) District Judge Ray in a carefully prepared opinion said:

Under the common law the information was not necessarily verified; but as stated, this led to abuses and the adoption of the fourth amendment to the Constitution which in legal effect demands that no warrant shall issue upon an information filed by the United States attorney, unless it states facts, a crime, etc., and is supported by the oath of the officer filing it, who must speak from personal knowledge or by the oaths or affirmations of others who speak from personal knowledge.

There is nothing in the opinion rendered which holds that an information must in all cases be verified or supported by an affidavit showing probable cause. But only that an information must be so verified or supported when an application for the issuance of a warrant is based on it. The sole question before the court was as to the issuance of a warrant and the court declined to direct its issuance on an information made on the information and belief of the district attorney alone.

In *United States v. Morgan* (222 U. S., 274, 282 (1911)) the Supreme Court, in the case of one prosecuted for a violation of the Pure Food and Drugs Act, said:

A further answer is that as to this and every other offense the fourth amendment furnishes the citizen the nearest practicable safeguard against malicious accusation. He can not be tried on an information unless it is supported by the oath of some one having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors, the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the Government or prompted by private malice.

This statement as to the necessity of the information being supported by the oath of some one having knowledge of facts showing the existence of probable cause is obiter dictum. The court has certainly never decided that under such circumstances as exist in the case now before us no trial could be had.

In Foster's Federal Practice, fifth edition, section 494, page 1659, this usually accurate writer states the rule as follows:

An information can not be filed without leave of the court. * * * An information must be supported by an affidavit showing probable cause for the prosecution arising from facts within the knowledge of the affiant; or by the depositions of witnesses taken upon a preliminary examination or affidavits upon which a warrant of arrest against the accused was previously issued, which may be sufficient.

The limitation imposed by this amendment is a limitation solely upon the powers of the Federal Government and not upon the powers of the State governments. This principle of construction was settled as early as 1833 by a decision written by Chief Justice Marshall in the leading case of *Barron v. Baltimore* (7 Peters, 243) and has been adhered to by the Supreme Court in numerous cases which have subsequently arisen. But in the constitutions of some of the States a provision exists similar to that embodied in the fourth amendment. And we may briefly inquire as to the effect given to it, as respects informations, by the decisions of the State courts. They have held in a number of cases that a constitutional provision similar in terms to that embodied in the fourth amendment to the Constitution of the United States is violated if proceedings are had under an information which is not supported by the oath or affirmation of any person. (*Lustig v. People*, 18 Col., 217 (1893); *State v. Gleason*, 32 Kans., 245 (1884); *Myers v. People*, 67 Ill., 503 (1873); *Eichenlaub v. State*, 36 Ohio St., 140 (1880); *DeGraff v. State*, 2 Okl. Cr., 519 (1909); *Thornberry v. State*, 3 Tex. App., 36 (1877); *State v. Boulter*, 5 Wyom., 236 (1894).) But the State courts are not agreed in this view, some of them having reached a contrary conclusion. (See *State v. Smith*, 114 La., 322 (1905); *State v. Guglielmo*, 46 Oregon, 250 (1905); *Territory v. Cutinola*, 4 N. Mexico, 160 (1887).)

In the case at bar the information was not verified, neither was it supported by any affidavit. The information begins, "Now comes Henry A. Wise, United States attorney for the Southern District of New York, leave having been first had and obtained, and respect-

fully informs this court that," etc. It does not appear, however, that in obtaining leave of the court to file the information there was ever presented to the court any complaint under oath or any affidavit showing probable cause to believe that the person accused in the information had ever committed the offense charged against him.

If the fourth amendment makes it necessary that under all circumstances an information must be verified or supported by an affidavit showing probable cause, then proceedings had in the prosecution of the defendant can not be sustained. But the right secured to the individual by the fourth amendment, as we understand it, is not a right to have the information by which he is accused of crime verified by the oath of the prosecuting officer of the Government or to have it supported by the affidavit of some third person. His right is to be protected against the issuance of a warrant for his arrest except "upon probable cause supported by oath or affirmation" and naming the person against whom it is to issue. If the application for the warrant is made to the court upon the strength of the information, then the information should be verified or supported by an affidavit showing probable cause to believe that the party against whom it is issued has committed the crime with which he is charged. But if no warrant has issued, no arrest been made, and the person has voluntarily appeared, pleaded to the information, been tried, convicted, and fined, we fail to discover wherein any right secured to him by the fourth amendment has been infringed. The fact that in the case at bar the defendant demurred to the information because it was not verified and he then pleaded not guilty only after his objection to the demurrer was overruled does not affect the matter. There was nothing in the ruling of the court that deprived him of his constitutional right to have no warrant issued for his arrest "but upon probable cause, supported by oath or affirmation." No such warrant has been at any time issued and no application for its issuance has ever been so much as requested.

The Pure Food and Drugs Act makes it a crime against the United States if any part of the label on goods sent in interstate commerce is false and misleading. The goods shipped by the defendant were on the label "guaranteed to contain no gelatine, gum arabic, egg albumen, or similar article." The claim of the Government is that while the goods contained no gum arabic they did contain India gum and that India gum was "similar" to gum arabic. The jury found that this was so after being instructed that if they had a reasonable doubt on the subject they must find for the defendant. There was sufficient evidence to warrant the submission of the case to the jury and we find no error in the rulings of the court.

Judgment affirmed.

Issued May 13,, 1915.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 82.

FRANCIS G. CAFFEY, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the United States Circuit Court of Appeals for the First Circuit, reversing the judgment of the District Court of the United States for the District of Massachusetts in a proceeding involving the seizure, under section 10 of the Food and Drugs Act of June 30, 1906 (24 Stat., 768), of one hundred thirty-one boxes of confectionery.

SYLLABUS.¹

Confectionery containing talc is adulterated within the meaning of the act (section 7, "In the case of confectionery"), even though the amount of talc contained therein is a mere trace, which can be detected only by chemical analysis.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

October term, 1914.

No. 1086.

UNITED STATES OF AMERICA, PLAINTIFF in error, v. R. C. BOECKEL AND COMPANY ET AL., defendants in error.	}	Error to the District Court of the United States for the district of Massa- chusetts.
---	---	--

Before PUTNAM, BINGHAM, and ALDRICH, JJ.

OPINION OF THE COURT.

April 6, 1915.

BINGHAM, J. This is an information by the United States against 131 boxes of confectionery, a part of which had been transported into Massachusetts from New York and a part from Pennsylvania. The proceeding is under section 10 of the Food and Drugs Act of June 30, 1906 (34 Stat. at Large, p. 768, c. 3915), for the purpose of seizing and condemning the confectionery on the ground that it

¹ Not by the Court.

contained talc, and was therefore adulterated within the meaning of section 7 of the act. A warrant having issued, the marshal seized 104 boxes of the confectionery, that being all that could be found. R. C. Boeckel and Company appeared as claimants of 30 boxes and Henry Heide as claimant of 73 boxes of the property seized.

There was a trial by jury and a verdict that the confectionery was not adulterated.

It is conceded by the claimants that the confectionery was shipped in interstate commerce; that it was in the original and unbroken packages when seized; that it was treated with talc during the process of rolling in order to impart a polish and to prevent adhering; that minute quantities of talc may have adhered, but, if so, the quantity was so small as to be almost incapable of measurement. They deny that the talc was used as an adulterant or that the confectionery was adulterated within the meaning of the act. Talc is a mineral compound, not an article of food, and is known as hydrated silicate of magnesia. There was no evidence that it exists naturally in any form of confectionery.

Evidence was introduced which tended to prove that a little less than a pound of the confectionery taken as a sample from the boxes claimed by Heide contained talc to the amount of one tenth of one per cent, or about one half as much as you could heap on a ten-cent piece; that a like sample of that claimed by Boeckel and Company contained a little more than one one-hundredth of one per cent of talc; and that, if all the mineral matter found in the outer portion of the confectionery tested was talc, it would be a mere trace, which could be detected only by chemical examination.

The court refused to charge the jury that, if they found the confectionery contained talc, it was adulterated within the meaning of the statute; and instructed them, in substance, that it would not be adulterated if it contained a mere chemical trace of talc, and only if it contained a quantity of talc large enough to be significant or important for some possible practical purpose; that a mere chemical trace, only to be detected by a skilful chemist, would not be sufficient; that there must be enough to show some purpose of deception on the manufacturer's part; enough to show a want of that extreme care exhibited by the manufacturer in guarding the purity of his product. The errors assigned are to the refusal to give the requested instruction and to the instructions given.

The provisions of the statute material for our consideration in passing upon the questions raised by the assignments of error are as follows:

“An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs,

medicines, and liquors, and for regulating traffic therein, and for other purposes."

"SEC. 2. That the introduction into any State * * * from any other State * * * of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State * * * to any other State * * * any such article so adulterated or misbranded within the meaning of this act * * * shall be guilty of a misdemeanor," etc.

"SEC. 6. * * * The term 'food,' as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

"SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated * * *.

"In the case of confectionery:

"If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug."

"SEC. 10. That any article of food * * * that is adulterated * * * within the meaning of this act, and is being transported from one State, * * * to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation."

It is apparent from the language of section 7 that confectionery which contains any one of certain things there specified, to wit, terra alba, barytes, talc, chrome yellow, or any vinous, malt or spirituous liquor or narcotic drug, is deemed to be adulterated, and that, under section 2, its transportation in interstate commerce is prohibited. If the language of the statute is ambiguous in regard to what the standard is for determining adulteration on account of the use of the general terms,—“or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health,”—there is none where the specific terms above mentioned are employed. Congress, knowing that terra alba, barytes and talc were commonly used as adulterants in confectionery, to increase its weight and cheapen its quality, in its wisdom provided that confectionery containing any of these substances should be deemed adulterated and be excluded from transportation in commerce without regard to whether the quantity contained in a given article of confectionery was such as to increase its weight or cheapen its quality so as to deceive and mislead.

Chrome yellow is a metal which is widely used as a yellow pigment, and is an active poison. The consumption of vinous, malt and spirituous liquors leads to pauperism and crime. In declaring that

confectionery containing this pigment or any of the liquors named should be deemed adulterated, Congress likewise refrained from making the question of adulteration depend upon the quantity which the confectionery contained, and plainly manifested an intention that confectionery containing any of these things should be deemed to be adulterated. The language of the statute being unambiguous, so far as it relates to the particular adulterants mentioned, its words must be given their ordinary meaning. When so construed, confectionery which contains any of the specific substances or liquors named is adulterated, without regard to the question whether in the particular case the amount of added adulterant indicates an intention to deceive, or is liable to injure health or morals.

This construction of the statute is recognized in the case of *French Silver Dragee Company v. United States*, 179 Fed. 824, 828, where the court said, "We think that the history of the act, the object to be accomplished by it and the language of all its provisions require that it should be so interpreted that in the case of confectionery, as in the case of foods and drugs, the Government should establish, with respect to articles *not specifically named*, that they either deceive, or are calculated to deceive, the public or are detrimental to health." In that case the confectionery in question was coated with pure silver, which was not one of the substances specifically named in section 7, and, in order to render it an adulterant within the meaning of the general provisions,—“other mineral substance” or “other ingredient deleterious or detrimental to health,”—it was held that it must be shown that the silver coating was either deceptive or injurious to health, and that, as there was no proof of those facts, the confectionery could not be found to be adulterated within the meaning of the statute.

In many of the States laws have been passed prohibiting the sale of adulterated milk, and standards for determining adulteration have been fixed, such as that milk shall be regarded as adulterated “to which water or any foreign substance has been added,” or when it is “shown upon analysis to contain more than 87 per cent of watery fluid; or less than 13 per cent of milk solids.” And it has been uniformly held that milk to which water has been added, or milk to which water has not been added, but which contains more than 87 per cent of watery fluid or less than 13 per cent of milk solids, is adulterated, without regard to the quantity of water added or the extent to which an analysis showed the milk contained more of watery fluid or less of milk solids than the standard required; and these laws have been upheld as constitutional. *State v. Schlenker*, 112 Ia. 645; *Commonwealth v. Waites*, 11 Allen, 264; *Commonwealth v. Gordon*, 159 Mass. 8; *Commonwealth v. Schaffner*, 146 Mass. 512; *Commonwealth v. Wetherbee*, 153 Mass. 159; *State v. Campbell*, 64

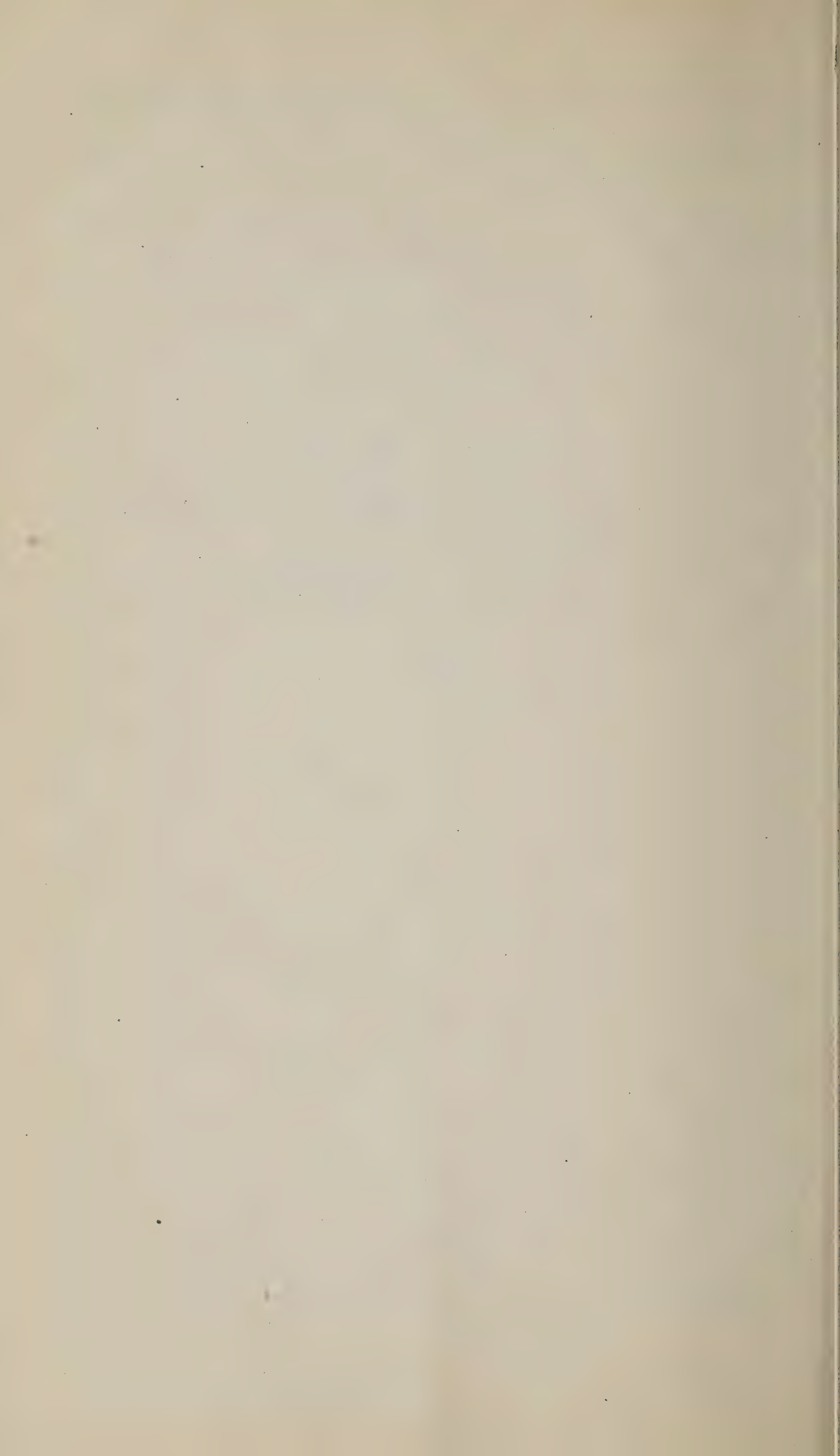
N. H. 402; *State v. Smythe*, 14 R. I. 100; *People v. West*, 106 N. Y. 294. See also *State v. Griffin*, 69 N. H. 1; *State v. York*, 74 N. H. 125; and *Reyfelt v. State*, 73 Miss. 415.

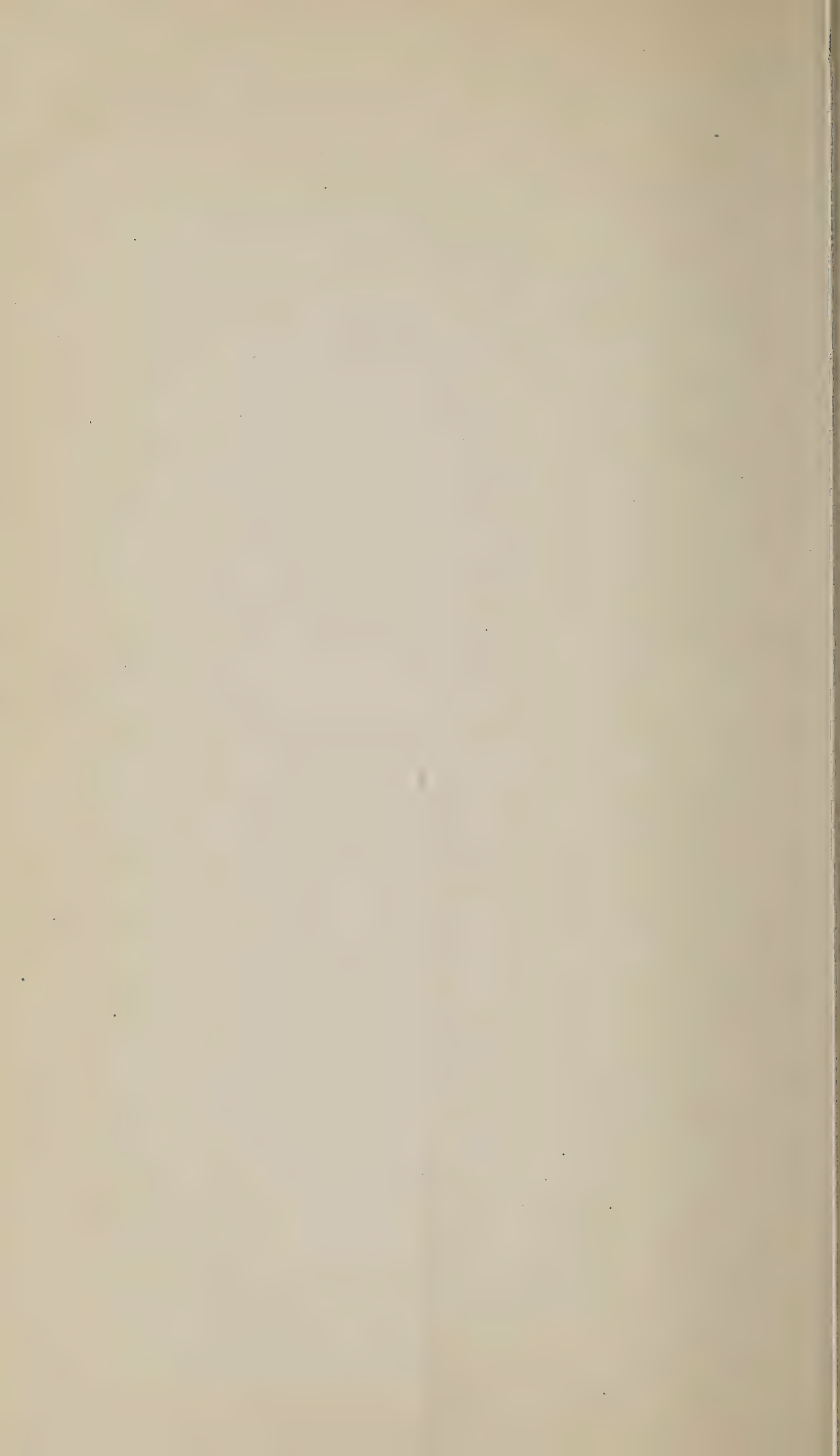
It is also to be noted that in section 7 the word "contain," taken in connection with the words "terra alba, barytes, talc, chrome yellow," "color," "flavor," "vinous, malt and spirituous liquors," is used in a general and not in a restricted sense, and that confectionery may be found to contain any of the prohibited substances if they are used as a compound, a filler, a flavor, a pigment to color it internally or externally, a coating, or other similar purpose, and especially if they are purposely used, even in minute quantities, for these or other similar purposes.

As the confectionery here in question was adulterated within the meaning of the act, if it contained any talc, and as there was evidence from which it could have been found that it contained talc, we are of the opinion that the court erred in declining to give the instruction requested, and in those that were given.

The judgment of the District Court is reversed, the verdict set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion.







United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 83.

FRANCIS G. CAFFEY, Solicitor.

THE MEAT-INSPECTION LAW.

Decision of the Circuit Court of Appeals for the Third Circuit, affirming the decision of the District Court for the Western District of Pennsylvania in a case involving a violation of the Meat-Inspection Law (Act of June 30, 1906; 34 Stat., 674).

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

ARMOUR AND COMPANY, PLAINTIFF IN error, v. UNITED STATES.	} No. 1900. March term, 1915.
--	-------------------------------

Error to the District Court of the United States for the Western District of Pennsylvania.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

In January, 1914, an indictment comprising two counts was preferred against Armour and Company in the Western District of Pennsylvania. The first count charged an offense against the Meat-Inspection Act of 1906, and the second count charged an offense against certain regulations ordained by the Secretary of Agriculture under the authority of the Act. The facts were agreed upon and the trial judge instructed the jury to render a verdict of guilty upon both counts, afterwards imposing a fine of \$200. No evidence was offered that the offenses charged had been deliberately or intentionally committed, but we agree that no such intent is essential. Although the acts complained of may have been mistaken or inadvertent, nevertheless an offense may have been committed.

The facts appeared by a written stipulation, from which the trial judge struck out certain paragraphs and sentences as irrelevant. We condense what remains:

Armour & Company is a corporation engaged in killing cattle, hogs, and sheep, preparing the meat for market in many forms, and selling as a wholesale dealer. It maintains plants in the United States

where the animals are killed and their flesh is prepared for market, its Chicago plant being under the supervision of the Department of Agriculture and bearing the official designation of Establishment 2 A; and it maintains also many selling or distributing agencies throughout the country where the meat products are sold, one such agency being at Twenty-first and Carson Streets, in the city of Pittsburgh, Pennsylvania. This Pittsburgh house is not under Government supervision, and has no official designation. On September 12, 1913, 20 cooked hams were wrapped by the defendant's agents at the branch house in Pittsburgh, each wrapper being a sheet of paraffin paper on which were printed two disconnected labels, one label reading: "Armour's 'Star' Boiled Ham, Armour and Company," and the other reading: "U. S. Inspected and Passed Under the Act of Congress of June 30, 1906, Establishment 2 A." Each wrapper was secured upon the ham by a cord or tape.

These hams had been shipped to the Pittsburgh house from Establishment 2 A. Before they left the Chicago plant each ham had been inspected and passed by an official inspector of the Department, and under his supervision the skin of each had been branded by a hot iron with the words "Armour's *Star* U. S. Inspected and Passed, Estab. 2 A," the meaning of these words being that the ham was one of Armour's "Star" grade or brand, and had been inspected and passed by the Department at Establishment 2 A. These hams had been pickled, boned, and tied (but not wrapped) at the Chicago plant before being sent to Pittsburgh, and on arrival there they had been subjected to the following process before being wrapped, namely: They had been immersed in clear water in an open kettle and cooked for a period of from four to six hours, and afterwards had been hung in a smokehouse for a period not exceeding two hours.

All the labels and brands used by the defendant have been approved by the Department, the particular form of wrapper hereinbefore referred to having been approved in July, 1912. As already stated, the branch house or distributing agency at Pittsburgh is not an official establishment within the meaning of the Meat-Inspection Act and the Department's rules and regulations, and the wrappers on which the labels were printed were not put around the hams under the supervision of a Government inspector. At the time these hams were wrapped at the Pittsburgh house they were sound, healthful, wholesome, and otherwise fit for human food.

It is true that the facts concerning the case in hand disclose no actual harm, and probably the Government's present objection could have been promptly removed without an appeal to the courts, but the case is here and we must dispose of it according to the letter of the law. In our opinion, the letter has been violated and we recognize the Government's right to insist on exact compliance with a

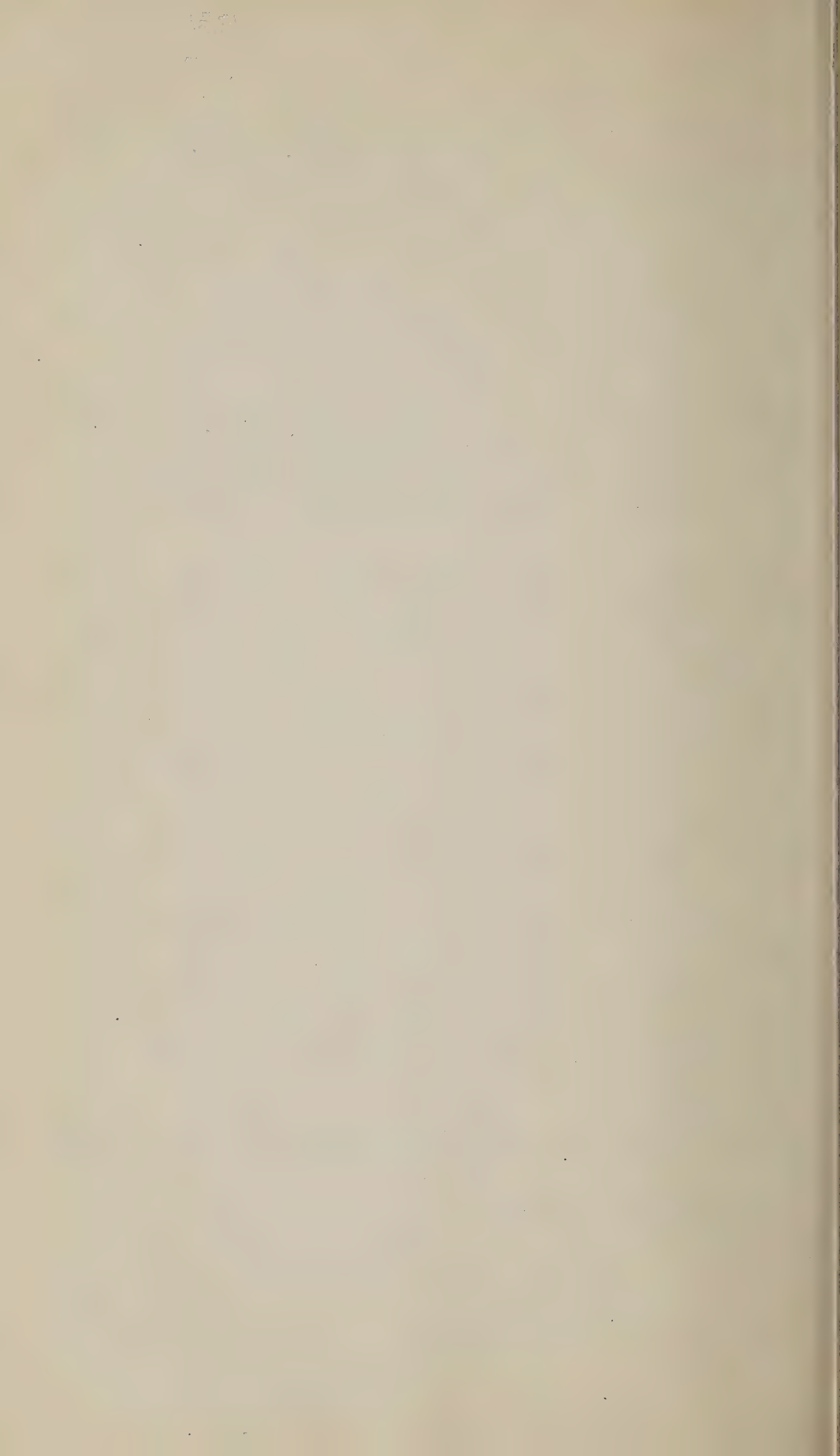
statute whose beneficent object is to safeguard the wholesomeness of food. The Act impliedly promises the public that Government stamps and labels may be relied on to tell the truth, and therefore special care must be taken to maintain the scrupulous accuracy of their statements. Even innocent mistakes may have dangers; carelessness is usually likely to lead to mischief. These marks and labels must therefore be protected, and no one must be allowed to use them except in accordance with the Act and the regulations; otherwise their value will be immediately impaired or lost and a chief purpose of the Act will be frustrated. Accordingly Congress has declared—

“That no person, firm, or corporation * * * shall, without proper authority, use * * * any of the marks, stamps, tags, labels, or other identification devices provided for in this Act, or in and as directed by the rules and regulations prescribed hereunder by the Secretary of Agriculture, on any carcasses, parts of carcasses, or the food product, or containers thereof, subject to the provisions of this Act * * *.”

Now, what the defendant did, was this: It brought certain hams from Chicago to Pittsburgh. They had been properly branded, and the brand expressed the exact truth, for each ham was a “Star” ham and each had been inspected and passed at Establishment 2 A. The Government does not contend that the defendant was debarred from boiling these hams and selling them branded and unwrapped, or from boiling them and wrapping them in plain paper. Apparently neither of these courses is forbidden by the law. But the defendant adopted neither course; instead, it boiled the hams and then covered them with wrappers on which were printed the labels referred to above, and these labels should not have been used, for they no longer told the truth. The ham was still a Star ham, but it had now been “boiled,” and that fact appeared for the first time on the wrapper. By itself the use of the word would not have been objectionable, but it was coupled with the statement that the ham—that is, the “boiled” ham—had been inspected and passed at Establishment 2 A, and this was a use of the label without proper authority, and was therefore a violation of the Act. In a word, the wrapper did not tell the truth about the Government inspection, and when this is said we think enough has been said.

It is unnecessary to pass upon the second count charging a violation of the Department’s regulations; the sentence can be supported by the first count alone.

The judgment is affirmed.



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 84.

FRANCIS G. CAFFEY, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Circuit Court of Appeals for the Seventh Circuit affirming the decision of the District Court of the United States for the Northern District of Illinois in a proceeding arising under sections 2 and 9 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768).

SYLLABUS.¹

1. Section 9 of the Food and Drugs Act includes within its scope continuing guaranties as well as those given at the time of the sale and in reference to specific goods.

2. A written guaranty from a food manufacturer to a prospective vendee to the effect that all goods furnished by the guarantor after the date thereof would comply with the Food and Drugs Act, held sufficient to relieve the vendee from prosecution under that act and to render the guarantor liable to the penalty thereunder for the interstate shipment by the vendee of an adulterated article furnished under the guaranty.

3. Questions as to the sufficiency and weight of expert evidence tending to show adulteration of an article of food at the time of its delivery by the guarantor to his vendee are matters properly to be determined by the jury where there is nothing in such evidence inherently impossible or even improbable.

4. Objection that the intrastate sale and delivery, under a guaranty contemplated by the Food and Drugs Act, of an article of food to a wholesale grocer engaged in interstate commerce did not come within interstate commerce, is not well founded.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JANUARY SESSION, OCTOBER TERM, 1914.

GLASER, KOHN & COMPANY, plaintiff in error, vs. UNITED STATES OF AMERICA, defendant in error.	}	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.
---	---	---

Before BAKER, KOHLSAAT, and MACK, *Circuit Judges*.

On or about January 15, 1907, plaintiff in error executed and delivered to Steele-Wedeles Company, of Chicago, Illinois, a guaranty in writing signed by it, which guaranty reads:

STEELE-WEDELES Co., *City*.

GENTLEMEN:—Replying to your favor 10th instant, would say we hereby guarantee that all goods as furnished you hereafter will comply with the Food and Drugs Act of

¹ Not by the court.

June 30, 1906, with the understanding, however, that if we at any time use labels or packages furnished by you or gotten up as per your instructions, we shall not be responsible for the form or wording of the same but only guarantee that goods covered by same are not adulterated. It is expressly understood that the above shall hold good until notice of revocation be given in writing.

Truly yours,

GLASER, KOHN & Co.,
G. D. GLASER, *Pres.*

Afterwards and on or about September 15, 1910, and while said guaranty, by its terms, was in full force, plaintiff in error sold and delivered to said Steele-Wedeles Company two dozen jars of preserves, described as "Herald Brand Fruit Preserves Blackberry Flavor Apple Preserves 74% Blackberry Preserves 26%," which jars of preserves Steele-Wedeles Company shipped in interstate commerce from Chicago to Rock Springs, in the State of Wyoming, on or about October 14, 1910. On or about October 20, 1910, an inspector of the United States Bureau of Chemistry purchased a sample of these preserves and sent the same, properly sealed, to the Bureau of Chemistry of the Department of Agriculture, where it was duly examined by experts on or about December 8, 1910, who pronounced the sample analyzed to contain mold and to be partly decomposed and made from partly decomposed fruit. Thereafter the United States filed its information, containing six counts, against plaintiff in error, of which only the fourth count is here involved, which charges plaintiff in error with unlawfully knowingly selling and delivering to Steele-Wedeles Company the said jars of preserves, contrary to the provisions of the so-called pure food law of the United States approved June 30, 1906, entitled "An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes," in that said jars of preserves, when and where they were so sold and delivered, were an adulterated article of food within the meaning of the act and consisted in part of decomposed vegetable substance, and further charging that Steele-Wedeles Company shipped said jars contrary to law, by way of a common carrier in interstate commerce to Rock Springs, Wyoming, as aforesaid, basing said information upon said guaranty as having been given and received under the terms of section 9 of said act of June 30, 1906.

On the trial the formal facts were stipulated into the record and evidence of the condition of the preserves when delivered to Steele-Wedeles Company was introduced. This evidence consisted of the opinions of experts, based on the conditions found at the time of the Washington analysis, that the fruit was partly decomposed not only at that time but also at the time of the sale and delivery by defendants to Steele-Wedeles Company. Plaintiff in error offered no evidence, but saved exceptions to the introduction of the said letter of guaranty

and to the sufficiency of the expert testimony. At the close of the evidence plaintiff in error moved the court to direct the jury to find plaintiff in error not guilty, which motion the court denied, and an exception was taken. Exception was also taken to that part of the court's instruction which charged the jury that the said guaranty was a legal guaranty. The jury found plaintiff in error guilty, and the court assessed a fine of \$200 and costs, to reverse which sentence this writ of error was sued out.

The errors relied on are: (1) the court held that the alleged guaranty was legal and sufficient to hold plaintiff in error under said section nine; (2) the evidence was insufficient to show that the preserves were adulterated at the time they were delivered to Steele-Wedeles Company.

KOHLSAAT, *Circuit Judge*, delivered the opinion:

Section 9 of the act approved June 30, 1906, reads as follows, viz:

SEC. 9. That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties which would attach, in due course, to the dealer under the provisions of this act.

It will be seen that this section does not, in terms, seem to comprehend a general continuing guaranty, but seems to apply to the specified article contemplated at the time. Such, indeed, is plaintiff in error's contention. That construction, however, is narrow and not in accord with the spirit of the act, which should be construed in the light of its purpose, as said by the Supreme Court in *McDermott v.*

Wisconsin, 228 U. S., 115-128, "and of the power exerted in its passage." This purpose the court, in *United States v. Antikamnia Co.*, 231 U. S., 654-665, declares "is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it." As between a dealer to whom the purity of the goods is guaranteed and the manufacturer who has the better opportunity of ascertaining the facts, the act aims to throw the ultimate responsibility on the latter and it should, therefore, be interpreted, if reasonably possible, so as to carry out this purpose to the fullest extent. In our judgment it is, therefore, not only a fair but the most reasonable construction of the act to include within the scope of section 9, continuing guaranties as well as those given at the time of the sale and in reference to specific goods. The belated position of plaintiff in error as to the meaning

of the statute with regard to a continuing guaranty comes to us undetermined with its earlier construction contained in the letter wherein it says "We hereby guarantee that all goods as furnished you hereafter will comply," etc., and "it is expressly understood that the above shall hold good until notice of revocation be given in writing." There is no reason in law for the claim that a continuing guaranty is invalid.

When by the terms of a written guaranty it appears that the parties look to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty. (Am. & Eng. Ency. of Law, 2nd Ed., vol. 14, p. 1139.) Letters of guaranty should receive a liberal, fair and reasonable interpretation, so as to attain the object for which the instrument is designed and the purpose to which it is applied. (*Lawrence v. McCalmont*, 2 How., 425-449.)

We are clearly of the opinion that the letter of January 15, 1907, constituted a good, valid and sufficient guaranty under the provision of said section nine, and that said guaranty attached to every item of sale made by plaintiff in error to Steele-Wedeles Company, after the sale thereof until revoked in accordance with the terms thereof, and that it furnished a basis for the filing of the information against plaintiff in error herein.

With regard to the sufficiency of the proof to sustain the verdict of the jury to the effect that the preserves in question were adulterated at the time they were delivered to Steele-Wedeles Company, and not prepared in accordance with said act of June 30, 1906, we find no such situation as would warrant us in substituting our opinion for that of the jury. While expert opinion evidence should be received with caution, it is solely within the province of the jury to determine its weight. They saw and heard the witnesses. In cases such as this, much of the evidence must necessarily be opinion evidence. In the present case there is nothing in the evidence inherently impossible or even improbable. The error is not well assigned.

With regard to the objection that the transaction does not, so far as plaintiff in error is concerned, come within interstate commerce, plaintiff in error does not in its brief include it among the errors relied on. We are, however, satisfied that the point is not well taken. Steele-Wedeles Company was a wholesale grocer engaged in interstate commerce, as plaintiff in error well knew. By selling and delivering the preserves to that corporation upon the terms of the guaranty, it deliberately placed them in interstate commerce channels.

The judgment of the district court is affirmed.

Issued January 20, 1916.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 85.

FRANCIS G. CAFFEY, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Supreme Court of the United States affirming judgments of the District Court of the United States for the District of Nebraska in proceedings instituted under section 10 of the Food and Drugs Act of June 30, 1906 (34 Stat., 768), as amended by the act of August 23, 1912 (37 Stat., 416).

SUPREME COURT OF THE UNITED STATES.

Nos. 50 and 51.—OCTOBER TERM, 1915.

Seven Cases (more or less), Each Containing
Twelve Bottles of Eckman's Alterative,
Eckman Manufacturing Company, Owner,
Plaintiff in Error,

50

vs.

The United States of America.

Six Cases (more or less), Each Containing
Twelve Bottles of Eckman's Alterative,
Eckman Manufacturing Company, Owner,
Plaintiff in Error,

51

vs.

The United States of America.

In Error to the Dis-
trict Court of the
United States for
the District of Ne-
braska.

[January 10, 1916.]

Mr. Justice HUGHES delivered the opinion of the Court.

Libels were filed by the United States, in December, 1912, to condemn certain articles of drugs (known as 'Eckman's Alterative') as misbranded in violation of section 8 of the Food & Drugs Act. The articles had been shipped in interstate commerce, from Chicago to Omaha, and remained at the latter place unsold and in the unbroken original packages. The two cases present the same

questions, the libels being identical save with respect to quantities and the persons in possession. In each case demurrers were filed by the shipper, the Eckman Manufacturing Company, which challenged both the sufficiency of the libels under the applicable provision of the statute and the constitutionality of that provision. The demurrers were overruled and, the Eckman Company having elected to stand on the demurrers, judgments of condemnation were entered.

Section 8 of the Food & Drugs Act, as amended by the act of August 23, 1912, c. 352, 37 Stat. 416, provides, with respect to the misbranding of drugs, as follows:

“Sec. 8. That the term ‘misbranded,’ as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

“That for the purposes of this Act an article shall also be deemed to be misbranded. In case of drugs:

* * *

“Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.”

The amendment of 1912 consisted in the addition of paragraph “Third,” which is the provision here involved.

It is alleged in each libel that every one of the cases of drugs sought to be condemned contained twelve bottles, each of which was labeled as follows:

“Eckman’s Alterative,—contains twelve per cent. of alcohol by weight, or fourteen per cent. by volume—used as a solvent. For all throat and lung diseases including Bronchitis, Bronchial Catarrh, Asthma, Hay Fever, Coughs and Colds, and Catarrh of the Stomach and Bowels, and Tuberculosis (Consumption) * * * Two dollars a bottle. Prepared only by Eckman Mfg. Co. Laboratory Philadelphia, Penna., U. S. A.”

And in every package, containing one of the bottles, there was contained a circular with this statement:

“Effective as a preventative for Pneumonia.” “We know it has cured and that it has and will cure Tuberculosis.”

The libel charges that the statement “effective as a preventative for pneumonia” is “false, fraudulent and misleading in this, to-wit, that it conveys the impression to purchasers that said article of drugs can be used as an effective preventative for pneumonia, whereas, in truth and in fact said article of drugs could not be

so used"; and that the statement, "we know it has cured" and that it "will cure tuberculosis" is "false, fraudulent and misleading in this, to-wit, that it conveys the impression to purchasers that said article of drugs will cure tuberculosis, or consumption, whereas, in truth and in fact said article of drugs would not cure tuberculosis, or consumption, there being no medicinal substance nor mixture of substances known at present which can be relied upon for the effective treatment or cure of tuberculosis, or consumption."

The principal question presented on this writ of error is with respect to the validity of the amendment of 1912.

So far it is objected that this measure, though relating to articles transported in interstate commerce, is an encroachment upon the reserved powers of the States, the objection is not to be distinguished in substance from that which was overruled in sustaining the White Slave Act, 36 Stat. 825. *Hoke v. United States*, 227 U. S. 308. There, after stating that 'if the facility of interstate transportation' can be denied in the case of lotteries, obscene literature, diseased cattle and persons, and impure food and drugs, the like facility could be taken away from 'the systematic enticement of and the enslavement in prostitution and debauchery of women', the court concluded with the reassertion of the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations. *Id.* pp. 322, 323. See *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 57; *Lottery Case*, 188 U. S. 321.

It is urged that the amendment of 1912 does not embrace circulars contained in the package, but only applies to those statements which appear on the package or on the bottles themselves; that is, it is said that the word 'contain' in the amendment must have the same meaning in the case of both 'package' and 'label'. Reference is made to the original provision in the first sentence of section 8 with respect to the statements, etc., which the package or label shall 'bear'. And it is insisted that if the amendment of 1912 covers statements in circulars which are contained in the package it is unconstitutional. Such statements, it is said, are not so related to the commodity as to form part of the commerce which is within the regulating power of Congress.

But it appears from the legislative history of the act that the word 'contain' was inserted in the amendment to hit precisely the case of circulars or printed matter placed inside the package, and we think that is the fair import of the provision. Cong. Rec., 62d

Cong., 2d Sess., Vol. 48, Part 11, page 11,322. And the power of Congress manifestly does not depend upon the mere location of the statement accompanying the article, that is, upon the question whether the statement is *on* or *in* the package which is transported in interstate commerce. The further contention that Congress may not deal with the package, thus transported, in the sense of the immediate container of the article as it is intended for consumption is met by *McDermott v. Wisconsin*, 228 U. S. 115. There the court said: "That the word 'package' or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act," (Food & Drugs Act) "clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. . . . Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping of box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed." And, after stating that the requirements of the act thus construed were clearly within the power of Congress over the facilities of interstate commerce, the court added that the doctrine of original packages set forth in repeated decisions, which protected the importer in the right to sell the imported goods, was not "intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end." *Id.* pp. 130, 131, 137.

Referring to the nature of the statements which are within the purview of the amendment, it is said that a distinction should be taken between articles that are illicit, immoral or harmful and those which are legitimate, and that the amendment goes beyond statements dealing with identity or ingredients. But the question remains as to what may be regarded as 'illicit' and we find no ground for saying that Congress may not condemn the interstate transportation of swindling preparations designed to cheat credulous sufferers and make such preparations, accompanied by false and fraudulent statements, illicit with respect to interstate commerce, as well as, for example, lottery tickets. The fact that the amendment is not limited, as was the original statute, to statements regarding identity or composition (*United States v. Johnson*, 221 U. S. 488) does not mark a constitutional distinction. The false and fraudulent state-

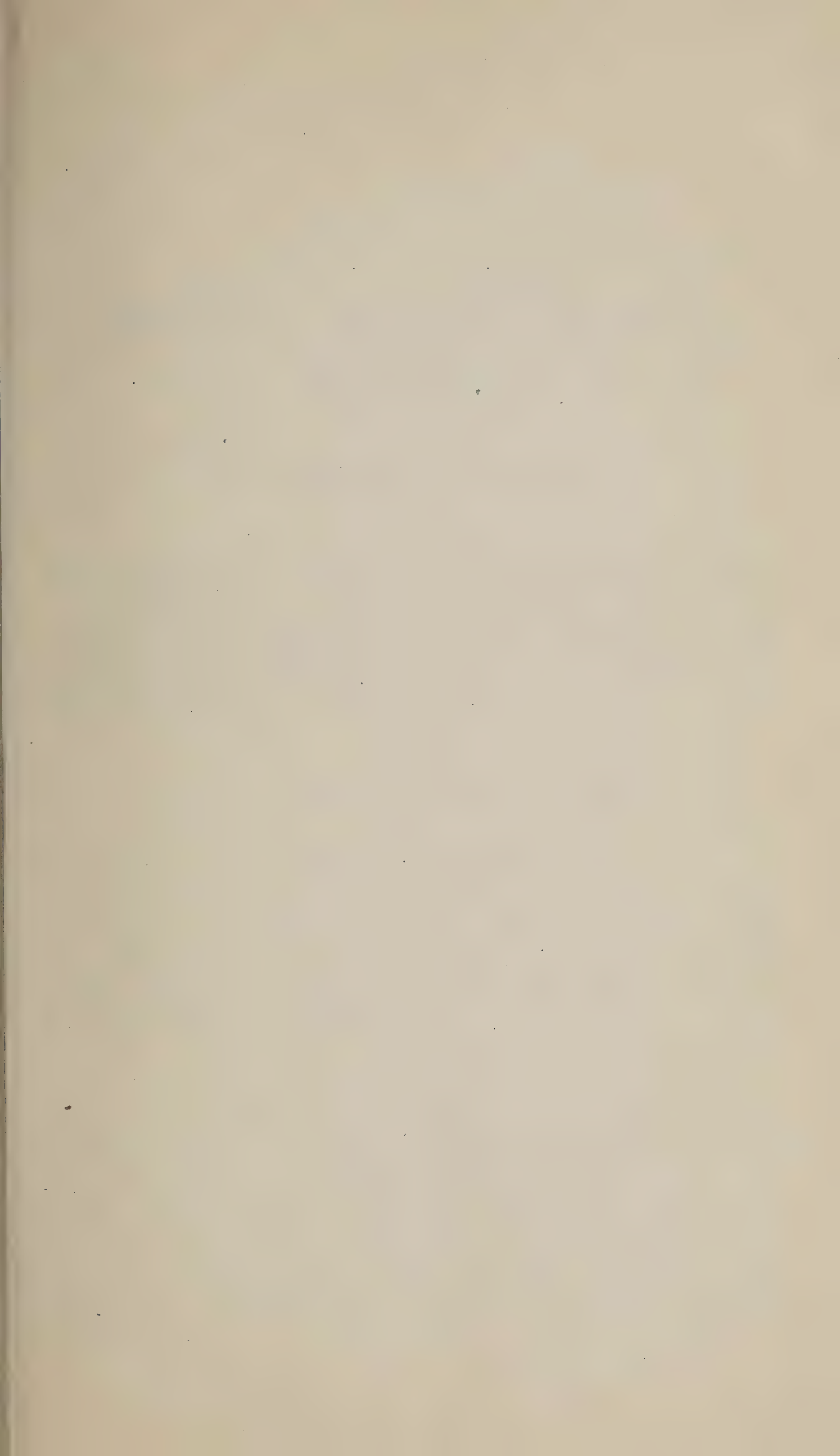
ment, which the amendment describes, accompanies the article in the package, and thus gives to the article its character in interstate commerce.

Finally, the statute is attacked upon the ground that it enters the domain of speculation (*American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94) and by virtue of consequent uncertainty operates as a deprivation of liberty and property without due process of law in violation of the Fifth Amendment of the Constitution, and does not permit of the laying of a definite charge as required by the Sixth Amendment. We think that this objection proceeds upon a misconstruction of the provision. Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners. Cong. Rec., 62d Cong., 2d Sess., Vol. 48, Part 12, App., p. 675. It was, plainly, to leave no doubt upon this point that the words 'false and fraudulent' were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive,—an intent which may be derived from the facts and circumstances, but which must be established. *Id.* 676. That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances, or compositions, alleged to be curative, are in a position to have superior knowledge and may be held to good faith in their statements. *Russell v. Clark's Executors*, 7 Cranch, 69, 92; *Durland v. United States*, 161 U. S. 306, 313; *Stebbins v. Eddy*, 4 Mason, 414, 423; *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 572, 574; *Missouri Drug Co. v. Wyman*, 129 Fed. 623, 628; *McDonald v. Smith*, 139 Mich. 211; *Hedin v. Minneapolis Medical Institute*, 62 Minn. 146, 149; *Hickey v. Morrell*, 102 N. Y. 454, 463; *Regina v. Giles*, 10 Cox, C. C. 44; *Smith v. Land & House Corporation*, L. R., 28 Ch. Div. 7, 15. It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the law-making power. Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion but constitute absolute falsehoods and in the nature of the case can be deemed to have been made only with fraudulent purpose. The amendment of 1912 applies to this field and we have no doubt of its validity.

With respect to the sufficiency of the averments of the libels, it is enough to say that these averments should receive a sensible construction. There must be a definite charge of the statutory offense, but we are not at liberty to indulge in hypercriticism in order to escape the plain import of the words used. There is no question as to the adequacy of the description of the article, or of the shipments, or of the packages. It is said that there was no proper statement of the contents of the circular. But the libels give the words on the circular and we think that the allegations were sufficient to show the manner in which they were used. The objection that it was not alleged that the statements in question appeared on the original packages or on the bottles themselves, as already pointed out, is based on a misconstruction of the statutory provision. The remaining and most important criticism is that the libels did not sufficiently show that the statements were false and fraudulent. But it was alleged that they were false and fraudulent, and with respect to tuberculosis it was averred that the statement was that the article 'has cured' and 'will cure', whereas 'in truth and in fact' it would 'not cure', and that there was no 'medicinal substance nor mixture of substances known at present' which could be relied upon to effect a cure. We think that this was enough to apprise those interested in the goods of the charge which they must meet. It was, in substance, a charge that, contrary to the statute, the article had been made the subject of interstate transportation with a statement contained in the package that the article had cured and would cure tuberculosis, and that this statement was contrary to the fact and was made with actual intent to deceive.

Judgments affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of these cases.



Issued May 31, 1916.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 86.

FRANCIS G. CAFFEY, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Supreme Court of the United States reversing the judgment of the Circuit Court of Appeals for the Sixth Circuit, which sustained a judgment of the District Court for the Eastern District of Tennessee dismissing the libel for condemnation and forfeiture of 40 barrels and 20 kegs of Coca Cola, seized under section 10 of the Food and Drugs Act of June 30, 1906 (34 Stats., 768). Case remanded for further proceedings in conformity with opinion of the Supreme Court.

SUPREME COURT OF THE UNITED STATES.

No. 562.—October term, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR, <i>vs.</i> FORTY BARRELS AND TWENTY KEGS OF COCA Cola, The Coca Cola Company of Atlanta, Georgia, Claimant.	}	In Error to the United States Circuit Court of Appeals for the Sixth Circuit.
--	---	--

[May 22, 1916.]

Mr. Justice HUGHES delivered the opinion of the court.

This is a libel for condemnation under the Foods and Drugs Act (June 30, 1906, c. 3915, 34 Stat., 768) of a certain quantity of a food product known as "Coca Cola" transported, for sale, from Atlanta, Georgia, to Chattanooga, Tennessee. It was alleged that the product was adulterated and misbranded. The allegation of adulteration was, in substance, that the product contained an added

poisonous or added deleterious ingredient, caffeine, which might render the product injurious to health. It was alleged to be misbranded in that the name "Coca Cola" was a representation of the presence of the substances coca and cola; that the product "contained no coca and little, if any cola" and thus was an "imitation" of these substances and was offered for sale under their "distinctive name." We omit other charges which the Government subsequently withdrew. The claimant answered, admitting that the product contained as one of its ingredients "a small portion of caffeine," but denying that it was either an "added" ingredient, or a poisonous or a deleterious ingredient which might make the product injurious. It was also denied that there were substances known as coca and cola "under their own distinctive names," and it was averred that the product did contain "certain elements or substances derived from coca leaves and cola nuts." The answer also set forth, in substance, that "Coca Cola" was the "distinctive name" of the product under which it had been known and sold for more than twenty years as an article of food, with other averments negating adulteration and misbranding under the provisions of the act.

Jury trial was demanded, and voluminous testimony was taken. The district judge directed a verdict for the claimant (191 Fed., 431), and judgment entered accordingly was affirmed on writ of error by the Circuit Court of Appeals (215 Fed., 535). And the Government now prosecutes this writ.

First. As to "*adulteration*." The claimant, in its summary of the testimony, states that the article in question "is a syrup manufactured by the claimant * * * and sold and used as a base for soft drinks both at soda fountains and in bottles. The evidence shows that the article contains sugar, water, caffeine, glycerine, lime juice, and other flavoring matters. As used by the consumer, about one ounce of this syrup is taken in a glass mixed with about seven ounces of carbonated water, so that the consumer gets in an eight-ounce glass or bottle of the beverage about 1.21 grains of caffeine." It is said that in the year 1886 a pharmacist in Atlanta "compounded a syrup by a secret formula, which he called 'Coca-Cola Syrup and Extract'"; that the claimant acquired "the formula, name, label, and good will for the product" in 1892, and then registered "a trade-mark for the syrup consisting of the name Coca Cola" and has since manufactured and sold the syrup under that name. The proportion of caffeine was slightly diminished in the preparation of the article for bottling purposes. The claimant again registered the name "Coca Cola" as a trade-mark in 1905, averring that the mark had been "in actual use as a trade-mark of the applicant for more than ten years next preceding the passage of

the act of February 20, 1905," and that it was believed such use had been exclusive. It is further stated that in manufacturing in accordance with the formula "certain extracts from the leaves of the coca shrub and the nut kernels of the cola tree were used for the purpose of obtaining a flavor" and that "the ingredient containing these extracts," with cocaine eliminated, is designated as "Merchandise No. 5." It appears that in the manufacturing process water and sugar are boiled to make a syrup; there are four meltings; in the second or third the caffeine is put in; after the meltings the syrup is conveyed to a cooling tank and then to a mixing tank where the other ingredients are introduced and the final combination is effected; and from the mixing tank the finished product is drawn off into barrels for shipment.

The questions with respect to the charge of "adulteration" are (1) whether the caffeine in the article was an added ingredient within the meaning of the act (sec. 7, subd. fifth); and if so, (2) whether it was a poisonous or deleterious ingredient which might render the article injurious to health. The decisive ruling in the courts below resulted from a negative answer to the first question. Both the district judge and the Circuit Court of Appeals assumed for the purpose of the decision that as to the second question there was a conflict of evidence which would require its submission to the jury. (191 Fed., 433; 215 Fed., 540.) But it was concluded, as the claimant contended, that the caffeine—even if it could be found by the jury to have the alleged effect—could not be deemed to be an "added ingredient," for the reason that the article was a compound, known and sold under its own distinctive name, of which the caffeine was a usual and normal constituent. The Government challenges this ruling and the construction of the statute upon which it depends; and the extreme importance of the question thus presented with respect to the application of the act to articles of food sold under trade names is at once apparent. The Government insists that the fact that a formula has been made up and followed and a distinctive name adopted do not suffice to take an article from the reach of the statute; that the standard by which the combination in such a case is to be judged is not necessarily the combination itself; that a poisonous or deleterious ingredient with the stated injurious effect may still be an added ingredient in the statutory sense, although it is covered by the formula and made a constituent of the article sold.

The term "food" as used in the statute includes "all articles used for food, drink, confectionery, or condiment, * * * whether simple, mixed, or compound." (Sec. 6.) An article of "food" is to be deemed to be "adulterated" if it contain "any added poisonous or other added deleterious ingredient which may render such article

injurious to health.” (Sec. 7, subd. fifth.¹) With this section is to be read the proviso in section 8, to the effect that “an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded” in the case of “mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names,” if the distinctive name of another article is not used or imitated and the name on the label or brand is accompanied with a statement of the place of production. And section 8 concludes with a further proviso that nothing in the act shall be construed “as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.”²

In support of the ruling below, emphasis is placed upon the general purpose of the act which it is said was to prevent deception, rather than to protect the public health by prohibiting traffic in articles which might be determined to be deleterious. But a description of the purpose of the statute would be inadequate which failed to take account of the design to protect the public from lurking dangers caused by the introduction of harmful ingredients, or which assumed that this end was sought to be achieved by simply requiring certain

¹ Section 7, with respect to “confectionery” and “food,” is as follows:

“SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated:

* * * * *

“In the case of confectionery:

“If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spiritous liquor or compound or narcotic drug.

“In the case of food:

“First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

“Second. If any substance has been substituted wholly or in part for the article.

“Third. If any valuable constituent of the article has been wholly or in part abstracted.

“Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

“Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

“Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.”

² Section 8 provides:

“SEC. 8. That the term ‘misbranded,’ as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular. * * *

disclosures. The statute is entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors," etc. In the case of confectionery, we find that it is to be deemed to be adulterated if it contains certain specified substances "or other ingredient deleterious or detrimental to health." So, under section 7, subdivision sixth, there may be adulteration of food in case the article consists in whole or in part of "any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter." In *United States v. Lexington Mills Co.*, 232 U. S., 399, 409, it was said that "the statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which

"That for the purposes of this act an article shall also be deemed to be misbranded :

* * * * *

"In the case of food :

"First. If it be an imitation of or offered for sale under the distinctive name of another article

"Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, herein, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

"Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

"Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases :

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

"Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding."

might render such articles injurious to the health of consumers." See also *United States v. Antikamnia Co.*, 231 U. S., 654, 665; H. R. Report No. 2118, 59th Cong., 1st sess., 6-9. It is true that in executing these purposes Congress has limited its prohibitions (*Savage v. Jones*, 225 U. S., 501, 529, 532) and has specifically defined what shall constitute adulteration or misbranding; but in determining the scope of specific provisions the purpose to protect the public health, as an important aim of the statute, must not be ignored.

Reading the provisions here in question in the light of the context, we observe:

(a) That the term "adulteration" is used in a special sense. For example, the product of a diseased animal may not be adulterated in the ordinary or strict meaning of the word but by reason of its being that product the article is adulterated within the meaning of the act. The statute with respect to "adulteration" and "misbranding" has its own glossary. We can not, therefore, assume that simply because a prepared "food" has its formula and distinctive name, it is not, as such, "adulterated." In the case of confectionery, it is plain that the article may be "adulterated," although it is made in strict accordance with some formula and bears a fanciful trade name, if in fact it contains an "ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug." And the context clearly indicates that with respect to articles of food the ordinary meaning of "adulteration" can not be regarded as controlling.

(b) The provision in section 7, subdivision fifth, assumes that the substance which renders the article injurious, and the introduction of which causes "adulteration," is an ingredient of the article. It must be an "added" ingredient; but it is still an ingredient. Component parts, or constituents, of the article which is the subject of the described traffic are thus not excluded but are included in the definition. The article referred to in subdivision fifth is the article sought to be made an article of commerce—the article which "contains" the ingredient.

(c) "Adulteration" is not to be confused with "misbranding." The fact that the provisions as to the latter require a statement of certain substances if contained in an article of food, in order to avoid "misbranding" does not limit the explicit provisions of section 7 as to adulteration. Both provisions are operative. Had it been the intention of Congress to confine its definition of adulteration to the introduction of the particular substances specified in the section as to misbranding, it can not be doubted that this would have been stated, but Congress gave a broader description of ingredients in defining "adulteration." It is "any" added poisonous

or "other added deleterious ingredients," provided it "may render such article injurious to health."

(d) Proprietary foods, sold under distinctive names, are within the purview of the provision. Not only is "food" defined as including articles used for food or drink "whether simple, mixed, or compound," but the intention to include "proprietary foods" sold under distinctive names is manifest from the provisos in section 8 which the claimant invokes. "Mixtures or compounds" which satisfy the first paragraph of the proviso are not only "articles of food," but are to enjoy the stated immunity only in case they do "not contain any added poisonous or deleterious ingredients." By the concluding clause of section 8 it is provided that nothing in the act shall be construed to require manufacturers of "proprietary foods" to disclose "their trade formulas" except in so far as the provisions of the act "may require to secure freedom from adulteration or misbranding," and the immunity is conditioned upon the fact that such foods "contain no unwholesome added ingredient." Thus the statute contemplates that mixtures or compounds manufactured by those having trade formulas, and bearing distinctive names, may nevertheless contain "added ingredients" which are poisonous or deleterious and may make the article injurious, and if so, the article is not taken out of the condemnation of section 7, subdivision fifth.

(e) Again, articles of food including "proprietary foods" which fall within this condemnation are not saved because they were already on the market when the statute was passed. The act makes no such distinction; and it is to be observed that the proviso of section 8 explicitly refers to "mixtures or compounds which may be now, or from time to time hereafter known, as articles of food." Nor does the length of the period covered by the traffic, or its extent, affect the question if the article is in fact adulterated within the meaning of the act.

Having these considerations in mind, we deem it to be clear that, whatever difficulties there may be in construing the provision, the claimant's argument proves far too much. We are not now dealing with the question whether the caffeine did, or might, render the article in question injurious; that is a separate inquiry. The fundamental contention of the claimant, as we have seen, is that a constituent of a food product having a distinctive name can not be an "added" ingredient. In such case the standard is said to be the food product itself which the name designates. It must be, it is urged, this "finished product" that is "adulterated." In that view, there would seem to be no escape from the conclusion that, however poisonous or deleterious the introduced ingredient might be, and however injurious its effect, if it be made a constituent of a product

having its own distinctive name it is not within the provision. If this were so, the statute would be reduced to an absurdity. Manufacturers would be free, for example, to put arsenic or strychnine or other poisonous or deleterious ingredients with an unquestioned injurious effect into compound articles of food, provided the compound were made according to formula and sold under some fanciful name which would be distinctive. When challenged upon the ground that the poison was an "added" ingredient, the answer would be that without it the so-called food product would not be the product described by the name. Further, if an article purporting to be an ordinary food product sold under its ordinary name were condemned because of some added deleterious ingredient, it would be difficult to see why the same result could not be attained with impunity by composing a formula and giving a distinctive name to the article with the criticised substance as a component part. We think that an analysis of the statute shows such a construction of the provision to be inadmissible. Certain incongruities may follow from any definition of the word "added," but we can not conclude that it was the intention of Congress to afford immunity by the simple choice of a formula and a name. It does not seem to us to be a reasonable construction that in the case of "proprietary foods" manufactured under secret formulas Congress was simply concerned with additions to what such formulas might embrace. Undoubtedly it was not desired needlessly to embarrass manufacturers of "proprietary foods" sold under distinctive names, but it was not the purpose of the act to protect articles of this sort regardless of their character. Only such food products as contain "no unwholesome added ingredient" are within the saving clause, and in using the words quoted we are satisfied that Congress did not make the proprietary article its own standard.

Equally extreme and inadmissible is the suggestion that where a "proprietary food" would not be the same without the harmful ingredient, to eliminate the latter would constitute an "adulteration" under section 7, subdivision third, by the abstraction of a "valuable constituent." In that subdivision Congress evidently refers to articles of food which normally are not within the condemnation of the act. Congress certainly did not intend that a poisonous or deleterious ingredient which made a proprietary food an enemy to the public health should be treated as a "valuable constituent," or to induce the continued use of such injurious ingredients by making their elimination an adulteration subject to the penalties of the statute.

It is apparent, however, that Congress in using the word "added" had some distinction in view. In the Senate bill (for which the measure as adopted was a substitute) there was a separate clause

relating to "liquors," providing that the article should be deemed to be adulterated if it contained "any added ingredient of a poisonous or deleterious character"; while in the case of food (which was defined as excluding liquors) the article was to be deemed to be "adulterated" if it contained "any added poisonous or other ingredient which may render such article injurious to human health." (Cong. Rec., 59th Cong., 1st sess., vol. 40, p. 897.) In explaining the provision as to "liquors," Senator Heyburn, the chairman of the Senate committee having the bill in charge, stated to the Senate (*Id.*, p. 2647): "The word 'added,' after very mature consideration by your committee, was adopted because of the fact that there is to be found in nature's products as she produces them poisonous substances to be determined by analysis. Nature has so combined them that they are not a danger or an evil—that is, so long as they are left in the chemical connection in which nature has organized them; but when they are extracted by the artificial processes of chemistry they become a poison. You can extract poison from grain or its products and when it is extracted it is a deadly poison; but if you leave that poison as nature embodied it in the original substances it is not a dangerous poison or an active agency of poison at all. So, in order to avoid the threat that those who produce a perfectly legitimate article from a natural product might be held liable because the product contained nature's poison it was thought sufficient to provide against the adding of any new substance that was in itself a poison, and thus emphasizing the evils of existing conditions in nature's product. That is the reason the word 'added' is in the bill. Fusel oil is a poison. If you extract it, it becomes a single active agency of destruction, but allow it to remain in the combination where nature has placed it, and, while it is nominally a poison, it is a harmless one, or comparatively so." For the Senate bill the House of Representatives substituted a measure which had the particular provisions now under consideration in substantially the same form in which they were finally enacted into law. (Sec. 7, subd. fifth; sec. 8, subd. fourth, provisos.) And the committee of the House of Representatives in reporting this substituted measure said (H. R. Report No. 2118, 59th Cong., 1st sess., pp. 6, 7, 11): "The purpose of the pending measure is not to compel people to consume particular kinds of foods. It is not to compel manufacturers to produce particular kinds or grades of foods. One of the principal objects of the bill is to prohibit in the manufacture of foods intended for interstate commerce the addition of foreign substances poisonous or deleterious to health. The bill does not relate to any natural constituents of food products which are placed in the foods by nature itself. It is well known that in many kinds of foods in their natural state some quantity of poisonous or deleterious ingredients exist.

How far these substances may be deleterious to health when the food articles containing them are consumed may be a subject of dispute between the scientists, but the bill reported does not in any way consider that question. If, however, poisonous or deleterious substances are added by man to the food product, then the bill declares the article to be adulterated and forbids interstate traffic."

This statement throws light upon the intention of Congress. Illustrations are given to show possible incongruous results of the test, but they do not outweigh this deliberate declaration of purpose; nor do we find in the subsequent legislative history of the substituted measure containing the provision any opposing statement as to the significance of the phrase. It must also be noted that some of the illustrations which are given lose their force when it is remembered that the statutory ban (sec. 7, subd. fifth) by its explicit terms only applies where the added ingredient may render the article injurious to health. See *United States v. Lexington Mills Co.*, *supra*. It is urged that whatever may be said of natural food products, or simple food products, to which some addition is made, a "proprietary food" must necessarily be "something else than the simple or natural article"; that it is an "artificial preparation." It is insisted that every ingredient in such a compound can not be deemed to be an "added" ingredient. But this argument, and the others that are advanced, do not compel the adoption of the asserted alternative as to the saving efficacy of the formula. Nor can we accept the view that the word "added" should be taken as referring to the quantity of the ingredient used. It is added ingredient which the statute describes, not added quantity of the ingredient, although of course quantity may be highly important in determining whether the ingredient may render the article harmful, and experience in the use of ordinary articles of food may be of greatest value in dealing with such questions of fact.

Congress, we think, referred to ingredients artificially introduced; these it described as "added." The addition might be made to a natural food product or to a compound. If the ingredient thus introduced was of the character and had the effect described, it was to make no difference whether the resulting mixture or combination was or was not called by a new name or did or did not constitute a proprietary food. It is said that the preparation might be "entirely new." But Congress might well suppose that novelty would probably be sought by the use of such ingredients, and that this would constitute a means of deception and a menace to health from which the public should be protected. It may also have been supposed that, ordinarily, familiar food bases would be used for this purpose. But, however, the compound purporting to be an article of food might be made up, we think that it was the intention of Congress that the

artificial introduction of ingredients of a poisonous or deleterious character which might render the article injurious to health should cause the prohibition of the statute to attach.

In the present case the article belongs to a familiar group; it is a syrup. It was originally called "Coca Cola Syrup and Extract." It is producing my melting sugar, the analysis showing that 52.64 per cent of the product is sugar and 42.63 per cent is water. Into the syrup thus formed by boiling the sugar there are introduced coloring, flavoring, and other ingredients, in order to give the syrup a distinctive character. The caffeine, as has been said, is introduced in the second or third "melting." We see no escape from the conclusion that it is an "added" ingredient within the meaning of the statute.

Upon the remaining question whether the caffeine was a poisonous or deleterious ingredient which might render the article injurious to health there was a decided conflict of competent evidence. The Government's experts gave testimony to the effect that it was, and the claimant introduced evidence to show the contrary. It is sufficient to say that the question was plainly one of fact which was for the consideration of the jury. See *443 Cans of Egg Product*, 226 U. S., 172, 183.

Second. As to "*misbranding*." In the second count it was charged that the expression "Coca Cola" represented the presence in the product of the substances coca and cola and that it contained "no coca and little if any cola." So far as "cola" was concerned the charge was vague and indefinite and this seems to have been conceded by the Government at the beginning of the trial. With respect to "coca," there was evidence on the part of the Government tending to show that there was nothing in the product obtained from the leaves of the coca plant, while on behalf of the claimant it was testified that the material called "Merchandise No. 5" (one of the ingredients) was obtained from both coca leaves and cola nuts. It was assumed on the motion for a peremptory instruction that there might be a disputed question of fact as to whether the use of the word "coca" is to be regarded "intrinsically and originally" as stating or suggesting the presence of "some material element or quality" derived from coca leaves, and it was also assumed that the evidence might be deemed to be conflicting with respect to the question whether the product actually contained anything so derived. (191 Fed., pp. 438, 439.) But these issues of fact were considered not to be material. On this branch of the case the claimant succeeded upon the ground that its article was within the protection of the proviso in section 8 as one known "under its own distinctive name." (215 Fed., p. 544.)

Section 8 (*ante*, p. 5), in its fourth specification as to "food," provides that the article shall be deemed to be "misbranded" "if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein which * * * shall be false or misleading in any particular." Then follows the proviso in question, that an article not containing any added poisonous or deleterious ingredients "shall not be deemed to be * * * misbranded" in the case of "mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article," if the name is accompanied with a statement of the place where the article has been produced.¹

A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e. g., coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public, it matters not that the name had originally a different significance. Thus, soda-water is a familiar trade description of an article which now, as is well known, rarely contains soda in any form. Such a name is not to be deemed either "misleading" or "false," as it is in fact distinctive. But unless the name is truly distinctive, the immunity can not be enjoyed; it does not extend to a case where an article is offered for sale "under the distinctive name of another article." Thus, that which is not coffee, or is an imitation of coffee, can not be sold as coffee; and it would not be protected by being called "X's Coffee." Similarly, that which is not lemon extract could not obtain immunity by being sold under the name of "Y's Lemon Extract." The name so used is not "distinctive," as it does not appropriately

¹ Among the departmental regulations (adopted in October, 1906, pursuant to section 3, for the enforcement of the act) is regulation 20, with respect to "distinctive names" under section 8, as follows:

"(a) A 'distinctive name' is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture, or compound from any other food product, mixture, or compound.

"(b) A distinctive name shall not be one representing any single constituent of a mixture or compound.

"(c) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

"(d) A distinctive name shall give no false indication of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product."

Regulation 27 is as follows:

"(a) The terms 'mixtures' and 'compounds' are interchangeable and indicate the results of putting together two or more food products.

"(b) These mixtures or compounds shall not be imitations of other articles, whether simple, mixt, or compound, or offered for sale under the name of other articles. They shall bear a distinctive name and the name of the place where the mixture or compound has been manufactured or produced.

"(c) If the name of the place be one which is found in different States, Territories, or countries, the name of the State, Territory, or country, as well as the name of the place, must be stated."

distinguish the product; it is an effort to trade under the name of an article of a different sort. So, with respect to "mixtures or compounds," we think that the term "another article" in the proviso embraces different compounds from the compound in question. The aim of the statute is to prevent deception, and that which appropriately describes a different compound can not secure protection as a "distinctive name."

A "distinctive name" may also, of course, be purely arbitrary or fanciful, and thus, being the trade description of the particular thing, may satisfy the statute, provided the name has not already been appropriated for something else so that its use would tend to deceive.

If, in the present case, the article had been named "Coca," and it were found that the name was actually descriptive in the sense that it fairly implied that the article was derived from the leaves of the coca plant, it could not be said that this was "its own distinctive name" if in fact it contained nothing so derived. The name, if thus descriptive, would import a different product from the one to which it was actually affixed. And, in the case supposed, the name would not become the "distinctive name" of a product without any coca ingredient unless in popular acceptation it came to be regarded as identifying a product known to be of that character. It would follow that the mere sale of the product under the name "Coca," and the fact that this was used as a trade designation of the product, would not suffice to show that it had ceased to have its original significance if it did not appear that it had become known to the public that the article contained nothing derived from coca. Until such knowledge could be attributed to the public the name would naturally continue to be descriptive in the original sense. Nor would it be controlling that at the time of the adoption of the name the coca plant was known only to foreigners and scientists, for if the name had appropriate reference to that plant and to substances derived therefrom, its use would primarily be taken in that sense by those who did know or who took pains to inform themselves of its meaning. Mere ignorance on the part of others as to the nature of the composition would not change the descriptive character of the designation. The same conclusion would be reached if the single name "Cola" had been used as the name of the product, and it were found that in fact the name imported that the product was obtained from the cola nut. The name would not be the distinctive name of a product not so derived until in usage it achieved that secondary significance.

We are thus brought to the question whether if the names "Coca" and "Cola" were respectively descriptive, as the Government contends, a combination of the two names constituted a "distinctive name" within the protection of the proviso in case either of the de-

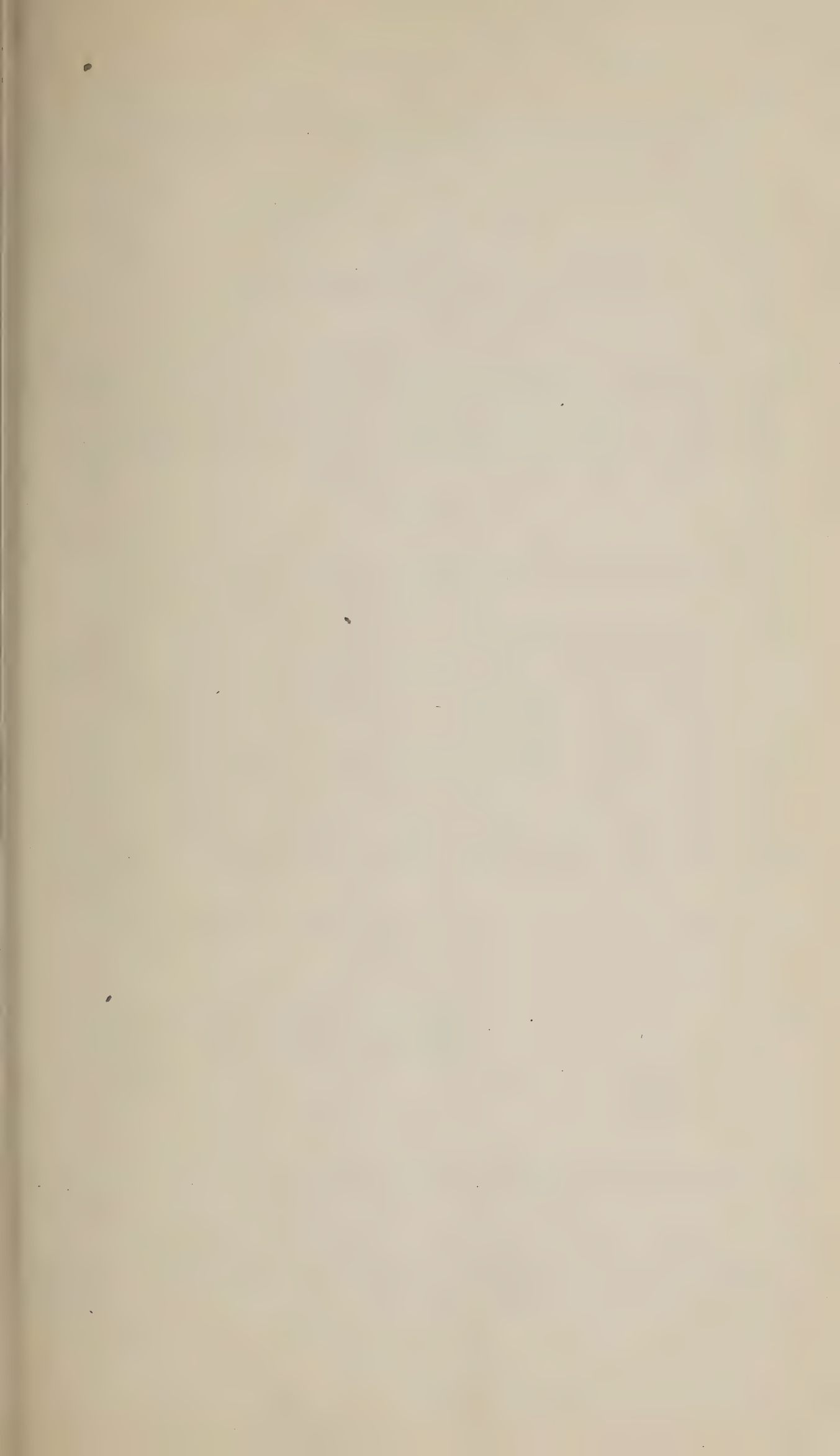
scribed ingredients was absent. It is said that "coca" indicates one article and "cola" another, but that the two names together did not constitute the distinctive name of any other substance or combination of substances. The contention leads far. To take the illustration suggested in argument it would permit a manufacturer, who could not use the name chocolate to describe that which was not chocolate, or vanilla to describe that which was not vanilla, to designate a mixture as "Chocolate-Vanilla," although it was destitute of either or both, provided the combined name had not been previously used. We think that the contention misses the point of the proviso. A mixture or compound may have a name descriptive of its ingredients or an arbitrary name. The latter (if not already appropriated) being arbitrary, designates the particular product. Names, however, which are merely descriptive of ingredients are not primarily distinctive names save as they appropriately describe the compound with such ingredients. To call the compound by a name descriptive of ingredients which are not present is not to give it "its own distinctive name"—which distinguishes it from other compounds—but to give it the name of a different compound. That, in our judgment, is not protected by the proviso, unless the name has achieved a secondary significance as descriptive of a product known to be destitute of the ingredients indicated by its primary meaning.

In the present case we are of opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged. Nor is there basis for the conclusion that the designation had attained a secondary meaning as the name of a compound from which either coca or cola ingredients were known to be absent; the claimant has always insisted, and now insists, that its product contains both. But if the name was found to be descriptive, as charged, there was clearly a conflict of evidence with respect to the presence of any coca ingredient. We conclude that the court erred in directing a verdict on the second count.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice McReynolds took no part in the consideration or decision of this case.



United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 87.

FRANCIS G. CAFFEY, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the United States Circuit Court of Appeals for the Third Circuit, affirming a decree of the United States Court for the Eastern District of Pennsylvania, condemning and forfeiting as misbranded certain packages of medicine proceeded against under the Food and Drugs Act of June 30, 1906 (34 Stat., 768), as amended by the act of August 23, 1912 (37 Stat., 416).

SYLLABUS.¹

The purpose of the amendment of August 23, 1912, to the Food and Drugs Act, was, in the branding of drugs, to punish false and fraudulent statements as to the curative or therapeutic effects thereof.

On the issue of misbranding under this amendment the opinion of a medical witness testifying as to the consensus of medical opinion concerning the therapeutic effects of the medicinal substance in question is competent evidence.

In a proceeding instituted under the Food and Drugs Act, as amended, for the condemnation and forfeiture of a certain medicinal preparation shipped in interstate commerce, which was alleged to be misbranded under the terms of the amendment to said act of August 23, 1912, by reason of false and fraudulent statements as to the therapeutic or curative effects of said preparation borne on the label, it was not error for the trial court to instruct the jury *inter alia* that if the statements complained of were false and made with a reckless or wanton disregard as to whether they were true or false, they might find for the Government.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

ELEVEN GROSS PACKAGES, MORE OR LESS, OF DR. WILLIAMS'S PINK PILLS (DR. WILLIAMS MEDICINE COMPANY, CLAIMANT)	} No. 2080, March Term, 1916.
<i>v.</i> UNITED STATES OF AMERICA.	

Before Circuit Judges BUFFINGTON, McPHERSON, and WOOLLEY.

BUFFINGTON, *Circuit Judge*.

In the court below, the United States filed a libel to forfeit certain packages of pills. Thereupon the Dr. Williams Medicine Company

¹ Not by the court.

claimed the packages seized, answered the libel, and the case proceeded to trial. After a verdict for the plaintiff and a decree of forfeiture, the claimant sued out this writ.

The claim of forfeiture is based on an alleged misbranding of the packages of pills in violation of an amendment to the Food and Drugs Act, passed August 23, 1912, which provides:

That for the purpose of this act an article shall also be deemed to be misbranded: In case of drugs * * * Third, if its package or label shall bear or contain any statement, design, or device, regarding the curative or therapeutic effect of such article, or any of the ingredients or substances contained therein, which is false and fraudulent.

The errors alleged group themselves into rulings on evidence, answers to points and exceptions to the court's charge. Without entering into a discussion of the many refined questions of words, terms, and medical theories with which the general subject is beclouded, we may say that to our mind the words used in the statute are clear in meaning, and the court below tried the case on that basis. The purpose of the act was, in the branding of drugs, to punish false and fraudulent statements regarding the curative or therapeutic effects of such drug or any of its ingredients. It follows, therefore, the case below resolved itself into two questions: First, were the statements regarding the curative or therapeutic effects of these pills false, and, second, were they fraudulent? Without citing in detail the rulings of the court in admitting the evidence, in answering the points and in charging the jury, we may say the court consistently adhered to admitting proof and directing the attention of the jury in points and charge to the two decisive elements of the branding being false and fraudulent. Limiting our extracts to locomotor ataxia alone, we note the branding complained of made the statement that the pills were—

Useful in locomotor ataxia and partial paralysis. * * * This remedy is offered to the public with full confidence in its efficacy in the treatment of diseases arising from or dependent upon impoverished blood, * * * rheumatism, leucorrhoea. * * * These pills are a valuable remedy for * * * sciatica * * * and have accomplished beneficial results in * * * partial paralysis and locomotor ataxia * * * cases diagnosed as locomotor ataxia and as partial paralysis, and having characteristic symptoms have shown beneficial results under this tonic treatment and in the cases under observation the resulting improvement has been lasting.

The libel alleged that:

These statements were false and fraudulent in this, that they indicated to the purchaser thereof and created in the minds of the purchasers thereof the impression and belief that the said article was a

remedy for, when in fact it was not a remedy for, locomotor ataxia, partial paralysis, etc., and that

These statements were false and fraudulent in this, that they indicated to the purchaser thereof and created in the minds of the purchasers thereof the impression and belief that the said article was a remedy for, when in fact it was not a remedy for, partial paralysis, locomotor ataxia, etc., which statements were made with the knowledge of their falsity and in reckless and wanton disregard of their truth or falsity for the purpose of defrauding the purchasers.

In support of its case, the Government called several witnesses, physicians of proven ability, knowledge, and experience, who testified that the pill would not and why it could not have any beneficial effects in locomotor ataxia and the other diseases named. They also testified to the fact that medical opinion was unanimous in so saying. It was also shown, and all of this without contradiction, that the pill was practically the well-known Blaud pill used generally in medical practice. It is complained, however, that the testimony of these witnesses was not competent, being a mere expression of their personal opinion or views. But an examination of the proofs shows that the case was wholly different from one where witnesses were testifying to their personal views upon a controverted question of opinion. The testimony here was of fact, namely, that there was general, uncontroverted consensus of opinion. For example, referring to the effect of these pills, the proofs were:

Q. How about locomotor ataxia?

A. Utterly useless.

Q. Is there any difference at all in medical opinion on that point?

A. I should say not, as far as I know medical opinion * * *.

Q. Is there anything known to medicine that can have a beneficial effect upon all these various troubles in one pill?

A. No, sir.

Q. Is there any difference of medical opinion on that point?

A. None whatever. I think medical opinion would be unanimous on that.

In the absence of countervailing proof in such matters, it was manifestly a question for the jury to determine the fair or fraudulent character of the branding statement. This question the court left to it, saying if they were satisfied, "that the pills were shipped in interstate commerce, with an honest belief on the part of those responsible for making the statement that they would do just what was stated on the label they would do, that then it would be your duty to return a verdict in favor of the defendant." Referring to such statements, the court further said:

You will take those facts into consideration and determine whether or not it was the intention of this language, interpreting it as an

ordinarily intelligent man would, on the part of the claimants to convey the impression that they were to cure or act as a remedy for the diseases and ailments even where the language does not directly say so. If it was the intention to so frame a statement that it conveyed those impressions and those statements were false, and they are known to be false, or you can infer the intention to defraud, then it would be your duty to return a verdict in favor of the Government. If you do not find that intention, of course, you will return a verdict in favor of the defendant.

See also, in answer to points, the court said, in substantial accord with *Cooper v. Schleslinger*, 111 U. S. 148, and *Lehigh Co., etc., v. Bamford*, 150 U. S. 665:

If you find it as a fact that the statements were false, and known to be false, then, of course, your verdict would be for the Government. If you find as a fact that they were not false, or that being false there was no intent on the part of the defendant, whether actual intent or implied intent to defraud, then your verdict would be for the claimant.

If you believe from the evidence that any one of the therapeutic claims as to the effect of these pills upon locomotor ataxia, St. Vitus' dance, sciatica, rheumatism, impotence, spermatorrhoea, or partial paralysis, was false, and was made by the claimant with a reckless and wanton disregard as to whether it was true or false, you may find a verdict for the Government.

On the whole, we may say the cause was properly tried and fairly submitted, and finding no error in the rulings, charge, points or answers in the court below, its decree is affirmed.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 88.

FRANCIS G. CAFFEY, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Circuit Court of Appeals for the Sixth Circuit, affirming a judgment of the District Court of the United States for the Northern District of Ohio in a case involving a violation of the Food and Drugs Act of June 30, 1906 (34 Stat. 768) as amended by the act of August 23, 1912 (37 Stat. 416).

SYLLABUS.¹

The appellate court will not sustain objections to the sufficiency in law of criminal information, when raised for the first time on appeal, unless the information is void or unless a refusal to sustain such objections would shock the judicial conscience. Objections to the sufficiency in law of a criminal information on the grounds that it is supported by affidavits which are invalid because sworn to before notaries public, and is not verified by the oath of the prosecuting officer, are purely technical and without merit, are waived by pleading to the information without raising objection, and do not warrant a reversal when raised for the first time on appeal, irrespective of whether they would have been good if properly raised in the court below.

U. S. R. S. 1025, providing that an indictment shall not be affected "by reason of any defect or imperfection in matter or form only which shall not tend to the prejudice of the defendant" is applicable to criminal informations. Assuming that defendant's knowledge of the false and fraudulent character of the therapeutic or curative representations must be alleged, this requirement is substantially met and the defendant is informed of the crime intended to be alleged by a criminal information which charges the defendant with shipping interstate in violation of the Food and Drugs Act, as amended, a medicinal compound bearing his own name upon the label together with certain statements as to its therapeutic efficacy, which statements were alleged to be false and fraudulent in that they were applied to said article knowingly and in reckless and wanton disregard of their truth or falsity so as to represent falsely and fraudulently to the purchasers thereof that the medicine possessed certain therapeutic effects which it did not.

Held, on objection to the information for failure to allege that the misrepresentations complained of were on the "ultimate container," that the allegations therein to the effect that the shipment consisted of certain packages and that the packages contained the circular or pamphlet later described therein, and that one of the alleged misrepresentations appeared on the label of the carton aforesaid, and that the other was included in the circular or pamphlet aforesaid, fairly interpreted meant that the representations were intended to accompany the bottles into the hands of the consumers, it being a matter of common knowledge that proprietary medicines in bottles are usually sold to the consumer in cartons and that the latter contain circulars or other advertising matter.

¹ Not by the court.

The court below properly overruled a motion to direct a verdict for the defendant and left to the jury to find whether the broad therapeutic claims made for defendant's medicine and charged in the information to be false and fraudulent were so in fact, where there was competent medical testimony to the effect that such claims were contrary to all medical science and where there was no competent medical testimony other than that of the defendant himself in opposition thereto, notwithstanding that there was undisputed evidence that the medicine had some palliative effect in some of the diseases for which it was claimed to be a remedy, and testimony from persons who had used the medicine that they had been cured thereby of some of the ills mentioned.

The defendant was a graduate physician, and the jury were justified, under all the evidence in the case, in presuming that he knew the falsity of the broad claim made for his compound.

The term "remedy" implies a curative tendency, although not, of course, guaranteeing a cure.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

No. 2937.

CHARLES M. SIMPSON, TRADING AS DR. C. M.	} Error to the District Court of the United States for the North- ern District of Ohio.
Simpson's Medical Institute, plaintiff in error,	
v.	
THE UNITED STATES OF AMERICA, DEFEND- ant in error.	

[Submitted March 16, 1917. Decided May 8, 1917.]

Before KNAPPEN and DENISON, *Circuit Judges*, and SATER, *District Judge*.

KNAPPEN, *Circuit Judge*.

Plaintiff in error was convicted, upon trial by jury, under an information charging the interstate shipment of certain drugs (in violation of the Food and Drugs Act, June 30, 1906, 34 Stat. 768, as amended by the act of August 23, 1912, 37 Stat. 416), alleged to be misbranded in that the label of the carton or package containing the drug (as well as a circular therein) contained false and fraudulent statements regarding the curative or therapeutic effect of the drugs. But two grounds for reversal are presented.

1. The first ground is that the information was insufficient in law. It was accompanied by affidavits of four persons relating in part to the actual shipment of the offending articles and the presence in the inclosed packages of the label and circular referred to, and in part to the chemical analysis of the drugs and the alleged falsity of the claims made as to their therapeutic effect.

The information was not sworn to, but states that the court was "given to understand and be informed upon the oaths of * * *

whose affidavits are hereto attached and made a part hereof, as follows, to wit." Two of the affidavits were sworn to before notaries public. It is urged that the information was insufficient because not upon the oath of the prosecuting officer, but solely upon oaths of the witnesses by affidavit, and that oaths taken before notaries public were invalid.

We need not consider whether the objection would have been good had it been made in the court below. Defendant in fact pleaded not guilty to the information, without demurring or moving to quash, and the record does not indicate that the attention of the district court was ever directed to the alleged insufficiency of the information. Unless it was void, the question presented can not for the first time be raised in the appellate court, unless a refusal to so consider it would shock the judicial conscience. *Keliher v. United States*, C. C. A. 1, 193 Fed. 8, 10. Had there been no affidavit of witnesses, the information would not have been void for lack of the oath of the prosecuting counsel (*Weeks v. United States*, C. C. A. 2, 216 Fed. 292); and we do not regard the information as showing that it was filed without investigation by the district attorney (see *Frank v. United States*, C. C. A. 6, 192 Fed. 864, 867). The objection is purely technical and without merit, and was waived by pleading to the information without raising objection. *People v. Harris*, 103 Mich. 473; *People v. Turner*, 116 Mich. 390; *Bartlett v. State*, 28 O. St. 669. It is also urged that the information does not charge defendant with knowledge of the alleged false and fraudulent character of the representations made. We assume, for the purposes of this opinion, that such allegation is necessary. The gist of these representations, so far as need now be stated, is that the article was "a valuable remedy for lost nervous strength and treatment of all diseases which are really the result of diseases of the brain, spinal cord, medulla oblongata and the nerves given off from each of them." The information alleged that these representations were (omitting the words we have bracketed) "false and fraudulent in this, that the same were applied (by defendant) to said article knowingly, and in reckless and wanton disregard (on defendant's part) of their truth or falsity, so as to represent falsely and fraudulently to the purchaser thereof, and create in the minds of purchasers thereof an impression and belief that it was," etc. The criticism we are now considering would be fully met had the information actually contained (as it did not) the words above bracketed. But the defect was not substantial; it was only formal. The information charged that the shipment was made by defendant "trading as Dr. C. M. Simpson's Medical Institute," and that the name of the article given on the label of the carton was "Dr. C. M. Simpson's Cerebro-Spinal Nerve Compound." The natural construction would be that it was de-

fendant whose knowledge and reckless and wanton disregard of the truth was intended to be charged. The Federal statute (Rev. Stat., 1025) expressly provides that an indictment shall not be affected "by reason of any defect or imperfection in matter or form only which shall not tend to the prejudice of the defendant." *Rosen v. United States*, 161 U. S. 29; *Price v. United States*, 165 U. S. 311; *Tyomies Pub. Co. v. United States*, C. C. A. 6, 211 Fed. 385, 389. The rule applicable to an information is no less liberal. Its averments of facts constituting the offense need be only so certain and specific as fairly to inform defendant of the crime intended to be alleged, and as to make the judgment of conviction or acquittal thereon a complete defense to a second prosecution of the defendant for the same offense. *United States v. Hess*, 124 U. S. 483, 486, 487; *Stokes v. United States*, 157 U. S. 187; *Bennett v. United States*, C. C. A. 6, 194 Fed. 630, 632; *Hocking Valley R. R. Co. v. United States*, 210 Fed. 735. It is clear that the information fulfilled these requirements.

That the criticism urged is purely technical and without merit, in that defendant understood that his own intent was in issue, is affirmatively shown by the fact that at the opening of the trial defendant admitted that he made the shipment in question; that it contained the cartons, bottles, and wrappers exhibited in court, and that he was the proprietor and sole owner of the "Dr. C. M. Simpson Institute"; and by the fact that as a witness in his own behalf, and under examination by his own counsel, he testified directly to the absence of intentional false branding and fraudulent intent. It is finally urged that the information does not show that the alleged misrepresentations were in the "ultimate container," that is to say, in the package as it reaches the consumer. *McDermott v. Wisconsin*, 228 U. S. 115, 130. This objection, as well as the preceding ones, must be considered in the light of the fact that the question was not raised below. We think the information should fairly be interpreted to mean that the misrepresentations were intended to accompany the bottles into the hands of the consumers. It alleged that the shipment consisted of "certain packages," and that the packages contained the circular or pamphlet later described therein; that one of the alleged misrepresentations appeared "on the label of the carton aforesaid," and that the other was "included in the circular or pamphlet aforesaid." It is matter of common knowledge that proprietary medicines in bottles are usually sold to the consumer in cartons, and that the latter usually contain circulars or other advertising matter. We are not impressed with the suggestion that the circular was charged to have been inside "the article of drugs."

2. The remaining complaint is addressed to the denial of the defendant's motion to direct verdict in his favor. We think the motion

was properly denied. It seems unnecessary to set out in full the exact language of the representations alleged to be contained in the packages. It seems enough to say that defendant's compound was not only represented generally to be a valuable remedy for the treatment of all diseases "resulting from diseases of the brain, spinal cord, and medulla oblongata, and the nerves given off from each," "a remarkable discovery for the treatment of all nervous diseases," but also a "remarkable discovery for heart troubles," as well as a "most valuable remedy for nervous prostration, mania, melancholia, and neurasthenia." There was substantial testimony from competent medical witnesses that there was no remedy applicable to all the diseases mentioned; that medical science and medical experience furnish no support for the broad claims made for defendant's remedy; that "there is no one medicine that will prove a valuable remedy for all" the diseases enumerated. There was further substantial testimony from competent witnesses that bromides, which constitute a prominent ingredient in defendant's remedy, are sedative in their nature and in ordinary doses, not stimulating; that while thus helpful in quieting an exalted or excited state of the nerves, as in many cases, including some cases of mania, they are not only helpful, but are positively injurious in depressed conditions, as in melancholia; that there is no one remedy for all spinal diseases, nor for all cases of neurasthenia, or heart trouble, nor for all cases of melancholia or of mania; that some diseases of the heart require sedatives, others stimulants; that the same is the case with neurasthenia and certain other nervous diseases mentioned; and that in some cases of nervous prostration and other nervous affections the administering of sedatives or depressants is harmful; that bromides are not suitable to the treatment of the mentally and physically depressed. There was further testimony to the same effect as to others of the diseases included, either specifically or by general description, in the claims made for the remedy; also that defendant's compound was dangerous to intrust to the hands of a layman. Aside from defendant's own testimony, there was no competent medical testimony in opposition to that presented by the Government, to the effect that the claims made for the medicine were contrary to all medical science. The defendant's proposition that the presence of ammonium-carbonate neutralized the effect of the bromides as depressants was denied by medical witnesses for the government. True, it appeared beyond dispute that bromides are beneficial, at least as a palliative in quieting the nerves and inducing sleep, in ordinary cases of nervous excitability; and there was testimony on the part of the defense that several persons had received benefit, indeed, many of them claimed to have been cured, by the use of defendant's remedy. But such testimony, at

the most, bore only upon the question of fact whether the alleged representations were, as made, false and fraudulent. There was still room for a conclusion that substantial mischief resided in the claim of a universally efficacious remedy for the numerous and widely prevalent maladies; for the term "remedy" must at least imply a curative tendency, although not of course guaranteeing a cure. The defendant was a graduate physician, and the jury were justified, under all the evidence in the case, in presuming that he knew the falsity of the broad claim made for his compound.

The brief of defendant's counsel criticizes the admission of certain testimony, although we do not understand that such admission is relied on for reversal. We may say, however, that we have examined all the criticisms which are made the subject of either exception or assignment, and find no error.

The judgment of the district court is accordingly affirmed.

1870
1871

11/17/1917

11/17/1917

11/17/1917

11/17/1917

11/17/1917

11/17/1917

11/17/1917

11/17/1917

11/17/1917

11/17/1917

11/17/1917

11/17/1917

11/17/1917

11/17/1917

3045C

MAILED

United States Department of Agriculture.

OFFICE OF THE SOLICITOR—Circular No. 89.

WILLIAM M. WILLIAMS, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Supreme Court of the United States affirming the judgment of the Circuit Court of Appeals for the Second Circuit, which sustained a conviction under the second count of a criminal information charging a violation of section 8, subdivision 1, in the case of food, of the Food and Drugs Act of June 30, 1906 (34 Stat., 768).

SUPREME COURT OF THE UNITED STATES.

No. 109.—October Term, 1917.

OSCAR J. WEEKS, PETITIONER,	}	On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.
<i>vs.</i>		
THE UNITED STATES.		

[February 4, 1918.]

Mr. Justice VAN DEVANTER delivered the opinion of the court.

This was a prosecution under the act of June 30, 1906, c. 3915, 34 Stat., 768, upon a charge of shipping an article of food in interstate commerce in circumstances making the shipment a violation of the act. The information contained two counts, both charging that the article was misbranded—one because it bore a false and misleading label, and the other because it was offered for sale as lemon oil when in truth it was an imitation thereof containing alcohol and citral derived from lemon grass. In the district court there was a conviction upon both counts, and the Circuit Court of Appeals reversed the conviction as to the first count and affirmed it as to the second (224 Fed., 64). The judgment upon the latter is all that is brought here for review.

The defendant was engaged in making and selling various articles of food used by bakers, confectioners, and ice-cream makers, including the article with which this prosecution is concerned. On the occasion in question he shipped from one State to another a quantity of this article labeled "Special Lemon. Lemon Terpene

and Citral." The printed record, although not purporting to contain all the evidence, shows that there was testimony tending to prove the following facts, among others: The shipment was made to fill an order solicited and taken by a traveling salesman in the defendant's employ. The salesman had been supplied by the defendant with a sample bottle of the article which was labeled simply "Special Lemon." In offering the article for sale and soliciting the order the salesman exhibited the sample and represented that the article was pure lemon oil obtained by a second pressing and that this pressing produced a good, if not the best, oil. In truth the article was not lemon oil, but an imitation thereof containing alcohol and citral made from lemon grass. Some of the elements of lemon oil were present in other than the usual proportions and others were entirely wanting.

The testimony respecting the salesman's representations was admitted over the defendant's objection; and later the court denied a request on the part of the defendant that the jury be instructed that this testimony could not be considered, but only the statement appearing on the label when the article was shipped. In that connection the court told the jury that the defendant could not be held responsible criminally by reason of any representations made by the salesman unless it appeared beyond a reasonable doubt that the same were made by the defendant's authority.

The defendant, who is the petitioner here, complains of the admission and consideration of this testimony and insists that under the statute the question whether an article is misbranded turns entirely upon how it is labeled when it is shipped, regardless of any representations made by a salesman, or even the vendor, in offering it for sale.

The statute, in its second section, makes it unlawful to ship or deliver for shipment from one State to another "any article of food or drugs which is adulterated or misbranded within the meaning of this act." In its eighth section it declares:

That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall *also* be deemed to be misbranded:

In the case of drugs:

* * * * *

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

This section contains other provisions relating to misbranding, but they are not material here and need not be set forth or specially noticed.

It is apparent that the statute specifies and defines at least two kinds of misbranding, one where the article bears a false or misleading label and the other where it is offered for sale under the distinctive name of another article. The two are quite distinct, a deceptive label being an essential element of one but not of the other. No doubt both involve a measure of deception, but they differ in respect of the mode in which it is practiced. Evidently each is intended to cover a field of its own, for otherwise there would be no occasion for specifying and defining both. That one article of food may be offered for sale in the distinctive name of another and the offer accomplish its purpose without the aid of a false or misleading label hardly needs statement.

The statute does not attempt to make either kind of misbranding unlawful in itself, but does, as before indicated, make it unlawful to ship or deliver for shipment from one State to another an article of food which is misbranded in either way. That this is a legitimate exertion of the power of Congress to regulate interstate commerce is settled by our decisions. *Hipolite Egg Co. v. United States*, 220 U. S., 45; *McDermott v. Wisconsin*, 228 U. S., 115, 128; *Seven Cases of Eckman's Alterative v. United States*, 239 U. S., 510, 514. It also is settled by our decisions that "the negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce." *Robbins v. Shelby Taxing District*, 120 U. S., 489, 497; *Crenshaw v. Arkansas*, 227 U. S., 389, 396.

It follows that the testimony respecting the representations of the defendant's traveling salesman was rightly admitted in evidence and submitted to the jury. It tended to prove that the order, to fill which the shipment was made, was obtained by offering the article for sale in the distinctive name of another article, and therefore that the article was misbranded within the meaning of the statute. To have confined the jury's attention to the label borne by the article when it was shipped, as was requested by the defendant, would have been to disregard the nature of the charge in the second count and the distinction between the two kinds of misbranding.

In the Circuit Court of Appeals the view was expressed that intent was not an element of the offense charged in the second count, and therefore that it was immaterial whether the representations of the salesman had the sanction of the defendant. Complaint is now made of this. But the question is not in the case, the view expressed by the Circuit Court of Appeals not being essential to an affirmance of the judgment. The District Court had expressly instructed the

jury that to hold the defendant responsible criminally by reason of such representations it must appear, and appear beyond a reasonable doubt, that they were made by his authority. The record before us does not show that the defendant objected to the submission of this question to the jury in this way, neither does it purport to contain all the evidence. The verdict therefore must be taken as conclusively determining that the representations were made with the defendant's sanction.

Judgment affirmed.

A true copy.

Test:

CLERK SUPREME COURT, U. S.

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 90.

WILLIAM M. WILLIAMS, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Circuit Court of Appeals for the Seventh Circuit, affirming a judgment of the District Court of the United States for the Southern District of Ohio in a case involving a violation of the Food and Drugs Act of June 30, 1906 (34 Stat., 768).

SYLLABUS.¹

Plaintiff in error contended that it was shipping milk from a receiving station in Illinois to itself in Missouri, there to be treated, impurities removed, and the milk standardized; that while in transit it was not an article of food such as defined by the act; and did not become such an article of food until after treatment; *Held* that the adoption of this conclusion would do violence to the plain language of section 2 of the act, and that it would be an unjustifiable construction of the act to make liability turn upon a difference in identity of consignor and consignee or the secret intent with which a shipper made the shipment.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 2534. October Term, 1917, January Session, 1918.

UNION DAIRY COMPANY, A COR- poration, plaintiff in error, v. UNITED STATES OF AMERICA, DE- fendant in error.	}	Error to the District Court of the United States for the Southern District of Illinois, Southern Division.
--	---	---

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

Writ of error to review judgment in favor of the Government and against plaintiff in error for violation of Food and Drugs Act.

Plaintiff in error is charged with having shipped 75 cans of milk from Troy, Illinois, to itself at St. Louis, Missouri, which milk was adulterated through the addition of water, and it was further charged that "filth, putrid and decomposed animal substance" was found therein.

EVANS, *Circuit Judge*.

Plaintiff in error contends that it was shipping the milk from a receiving station in Illinois to itself in Missouri, there to be treated, impurities removed, and the milk standardized; that while in transit

¹ Not by the court.

it was not an article of food such as was defined by the Food and Drugs Act; and did not become such an article of food until after treatment.

Were we to adopt this conclusion, it would do violence to the plain language of Sec. 2 of the act under which prosecution is brought. The first sentence of Sec. 2 reads:

“The introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia or from any foreign country, or shipment to any foreign country, of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited.”

Sec. 6 of the act provides:

“The term ‘food’ as used herein shall include all articles used for food, drink, confectionery, or condiment by man or other animals whether simple, mixed, or compound.”

Our conclusion is strengthened by another section of the act. Sec. 9 provides:

“No dealer shall be prosecuted under the provisions of this act when he can establish a guarantee signed by the wholesaler, jobber, manufacturer or other party, residing in the United States, from whom he purchased such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it.”

In *Hipolite Egg Co. v. United States*, 220 U. S. 45, the court said:

“Transportation in interstate commerce is forbidden to them (decayed eggs) and in a sense they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again at their destination and be given asylum in the mass of property in the state.”

In passing this act, Congress was endeavoring to protect the public by keeping out of commerce certain illicit articles, debased by adulteration, and it would be an unjustifiable construction of the act to make liability turn upon a difference in identity of consignor and consignee, or the secret intent with which a shipper made the shipment.

Plaintiff in error further contends that the evidence fails to show any adulteration at all, or such an adulteration as injured the milk as food. We have carefully examined the record, and giving the stipulation of the parties the fair meaning which we believe was intended, the adulteration was clearly established. It was unnecessary for the court to receive evidence to establish the fact that the addition of water to milk injuriously affected the quality or strength of milk. (See Sec. 7 of the act.)

Judgment is affirmed.

JUN 11 1917

United States Department of Agriculture,

OFFICE OF THE SOLICITOR—Circular No. 91.

WILLIAM M. WILLIAMS, Solicitor.

THE FOOD AND DRUGS ACT.

Decision of the Supreme Court of the United States reversing the judgment of the District Court for the Southern District of New York, which sustained a demurrer to a criminal information charging a violation of the Food and Drugs Act of June 30, 1906 (34 Stat., 768). Cause remanded for further proceedings.

SUPREME COURT OF THE UNITED STATES.

No. 468—October term, 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,	} In error to the District Court of the United States for the Southern District of New York.
<i>vs.</i>	
JOSEPH L. SCHIDER, TRADING AS "JOS. L. Schider & Co."	

[April 15, 1918.]

Mr. Justice McREYNOLDS delivered the opinion of the court.

An indictment containing six counts charged defendant, Schider, with violating the Food and Drugs Act of June 30, 1906 (34 Stat., 768), by delivering for shipment in interstate commerce food contained in a bottle plainly labeled as follows:

Compound
Ess Grape

Jos. L. Schider & Co.
93-95 Maiden Lane, New York.

Each count alleged the article was in imitation of grape essence artificially prepared from alcohol, water, and synthetically produced imitation oils, and contained no product of the grape nor any added poisonous or deleterious ingredient; and that the word "imitation" nowhere appeared.

The first count further alleged it was "unlawfully adulterated in that an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils had

been wholly substituted for a true grape product, which the article purported to be"; and the second that it was "unlawfully adulterated in that an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils had been mixed with the said article so as to reduce and lower and injuriously affect the quality and strength of the said article."

The third, fourth, fifth, and sixth counts, in varying ways, further alleged misbranding so as to deceive and mislead in that the label indicated a true grape product, whereas the article was not such but an imitation artificially prepared, one which contained nothing from grapes.

The trial court sustained a demurrer to each count upon the view that, properly, construed, the Food and Drugs Act did not apply to facts stated.

Pertinent portions of the act follow:

SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * *

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded: * * *

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, * * *

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: * * * Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: * * * (34 Stat., c. 3915, pp. 768, 770-771.)

The obvious and undisputed purpose and effect of the label was to declare the bottled article "a compound essence of grape." In fact, it contained nothing from grapes and was a mere imitation.

Within the statute's general terms the article must be deemed adulterated, since some other substance had been substituted wholly for the one indicated by the label; and, also, it was misbranded, for the label carried a false and misleading statement.

Defendant relies on the proviso in section eight which declares articles of food shall not be deemed adulterated or misbranded if they are "labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale. But we are unable to conclude that by simply using "compound" upon his label a dishonest manufacturer exempts his wares from all inhibitions of the statute and obtains full license to befool the public. Such a construction would defeat the highly beneficent end which Congress had in view.

We have heretofore said: "The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it." *United States v. Antikamnia Co.*, 231 U. S. 654, 655. "The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality." *United States v. Lexington Mill Co.*, 232 U. S. 399, 409. And see *United States v. Coca Cola Co.*, 241 U. S. 265, 277.

The stuff put into commerce by defendant was an "imitation" and if so labeled purchasers would have had some notice. To call it "compound essence of grape" certainly did not suggest a mere imitation but on the contrary falsely indicated that it contained something derived from grapes. See *Frank v. United States*, 192 Fed. 864. The statute enjoins truth; this label exhales deceit.

The trial court erred in sustaining the demurrer. Its judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

A true copy.

Test:

Clerk Supreme Court, U. S.

